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ABSTRACT

Section B of the Media and Law Section of these proceedings contains the following 12 papers: "Media Access to Civil Court Records" (Bill Loving); "Radio and TV Marti: Search for a First Amendment Theory of Government Expression in the Marketplace of Ideas" (Tim Gallimore); "Freedom of Expression and the American Mind: Hazelwood in Action in Pennsylvania" (Stephen G-M. Shenton and Jeffrey T. Bitzer); "SLAPPs and the Suppression of Public Participation: The Implications for the First Amendment and Public Relations" (W. Timothy Coombs); "Selective Silence: Major American Media and First Amendment Challenges" (Kathleen Bartzen Culver); "Metro Broadcasting v. FCC: U.S. Supreme Court Affirms FCC's Minority Preference Policies" (Sigman L. Splichal); "The Legacy of 'Hazelwood School District v. Kuhlmeier': The Supreme Court Further Narrows First Amendment Protection of Student Expression in Public Schools" (Arthur David Peppard); "The Courts and 'Titicut Follies': A Case Study in Privacy v. Public Interest" (Tory Read); "Federalism and Press Freedom: 'Immuno A.G.' in Historical Perspective" (James Parramore); "The CNN/Noriega Tapes Case and Prior Restraint Doctrine: An Ominous Shift?" (Sigman L. Splichal and Matthew D. Bunker); "Computer Technology v. Laws on Access" (Sandra Davidson Scott); and "Legal Ramifications of Electronic Imaging in Newspapers" (Greg Peters). (PRA)

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Part II: Media and Law, section B.

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Law Division
Student Paper

Media Access to Civil Court Records

by

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Presented to the Law Division of the Association
for Education in Journalism and Mass Communication
Boston, Massachusetts, August 1991

Access to Civil Court Records

Ask any group of adults to identify the major American carmakers whose products were associated with gas-tank fires and the only name you will hear will be Ford. The car cited will be the Pinto.

And yet, Ford was not the only carmaker whose designs posed a risk for motorists involved in rear-end collisions. General Motors built cars with designs similar to Ford's and GM cars were involved in numerous accidents in which persons were severely injured or killed because of gas-tank fires and explosions.

The difference between the publicity the two received lay in General Motors' savvy use of the court system to throw up a shield of secrecy over its legal problems arising from the injuries and deaths blamed on the design.

But today, makers of dangerous products, unsafe drugs and those whose business practices pose a threat to the public face a movement that promises to bring the legal consequences of those harms out into the open.

The Texas Supreme Court has authored one of the latest and most far-reaching changes in civil procedure to throw open the judicial process to an unprecedented level of public scrutiny.[1] In so acting, the justices opened another chapter in the battle over public and media access to the justice system. It is a controversy in which the media plays as great a role as an interested party as it does its traditional function of watchdog of government.

In the spring of 1990, the Texas court approved in a 5-4 vote Tex.R.Civ.Pro. 76a. Sealing Court Records. Justices on both sides of the vote cited both practical and philosophical reasons for their positions. Justice Lloyd Doggett, leader in the fight to adopt the rules, explained that the changes would help protect the public and promote confidence in the justice system, the *Dallas Morning News* reported. "It makes explicit the commitment of our judicial system to openness," he said.[2]

However, Chief Justice Tom Phillips, in the four-justice minority opposing the changes, expressed concern about the effects on the court system and the degree to which openness was extended. "This is not an area that very many other states, if really any other states, have ventured into.[. . .] I am not sure we really know the amount of extra work, the amount of court time, the amount of lawyer time that is going to be expended in determining what records should be open to the public."[3]

The Texas rule begins with a presumption of openness and details the reasons required before that presumption can be overcome. It provides that the court consider the general public health and safety in weighing a sealing request. Its mechanism allows intervention by parties and nonparties alike and includes steps that will ensure ample public notice of an attempt to seal records. The rule, which became effective Sept. 1, 1990, reads:

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

    (a) a specific, serious and substantial interest which clearly outweighs:

        (1) this presumption of openness;

        (2) any probable adverse effect that sealing will have upon general public health or safety;

    (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records means:

    (a) all documents of any nature filed in connection with any matter before any civil court, except;

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[1] "Justices OK rules to curb sealing of civil documents," The Dallas Morning News, p. 16A, April 17, 1990. The rules were "described by justices as the toughest in the nation [. . .]." Additionally, a review of the current case and statutory law in federal and state jurisdictions supports this contention in the areas delineated by the new Tex.R.Civ.Pro. 76a.

[2] Ibid.

[3] Ibid.

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3)documents filed in an action originally arising under the Family Code.

(b) settlement agreements, not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon general public health or safety, or the administration of public office, or the operation of government;

(c) discovery, not filed of record concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in a specific case, that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the court records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. Hearing. A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less then fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.[4]

5. Temporary Sealing Order. A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a,[5] upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. A temporary sealing order shall set the time of the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to all parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction. Any person may intervene as a matter or right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor, who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party

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[4] Texas Rules of Civil Procedure Rule 120a pertains to special appearance before a court to challenge jurisdiction.

[5] Texas Rules of Civil Procedure Rules 21 and 21a cover the process for motions and notice to parties.

seeking to seal records.

8. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

(COMMENT TO 1990 CHANGE: To establish guidelines for sealing certain court records in compliance with Government Code Section 22.010.)[6]

The new rule also required a change in the Texas Rule pertaining to protective orders.

TRCP 166b.5 Forms and Scope of Discovery; Protective Orders; Supplementation of Responses

5. Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interests of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only be such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution by limited, or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.

Florida also adopted new rules regarding the sealing of court records with its Sunshine in Litigation Act, enacted in 1990. That act prevents courts from entering orders or judgments which have the effect of concealing "public hazards." The term, "public hazard" encompasses a wide range of items and persons with the key feature being their causation of injury or likeliehood of causing injury.[7]

In approving its rules changes, the Texas Supreme Court dealt with a number of issues confronting courts today over how open should the civil court system be. Among the questions raised in that context are: are there any areas of litigation that ought to be kept from the prying of newspapers and broadcasters and conversely, should parties be able to conceal issues of public concern while they take advantage of the publicly operated justice system?

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[6] The Texas Supreme Court took up the matter following the previous session of the Texas Legislature. The lawmakers adopted section 22.010 of the Texas Government Code. That section dealt with rules regarding the sealing of court records and was to take effect Sept. 1, 1989.

> SEALING OF COURT RECORDS. The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interests of justice the records in a civil case, including settlements, should be sealed.

[7] Kevin Abbot, "Can You Keep a Secret?" The Practical Lawyer, Vol 36: No. 7, Oct. 1990, pp. 91, 93.

Texas Supreme Court Justice Nathan Hecht, involved in the record sealing dispute as both a state district court judge and on the Supreme Court, acknowledged the competing interests at stake in the court's consideration of the issue.

> The Legislature makes certain court records secret, when they involve minors for example, sometimes when they involve incompetents they are secret by statute, when they involve grand jury proceedings. So there is a legitimate area of secrecy in the judicial process just as in the other two branches of government. By the same token, you can't seal every court file, so this involves broad effects and involves many issues and is going to be very hard to resolve.[8]

The battle of media access to records in civil proceedings then is, like most disputes, fought on numerous levels, each of which offers opportunities for compelling arguments. Theorists and practitioners on each side bring forth constitutional arguments with opposing claims of privacy on the one hand, and the First Amendment right for the public to be able to observe the functioning of the government on the other. The controversy extends to matters of procedure with the power of the bench to control its own records balanced against the rights of society as a whole to evaluate the judicial branch of government and protect itself from undisclosed dangers in the marketplace. Eventually, the fight becomes one of dollars and cents with claims that opening access would cause impermissible harm through the disclosure of commercial information and opposing charges condemning base motives in evading responsibility by keeping evidence of wrongdoing from the public and potential plaintiffs.

An examination of the cases, arguments and practical effects of granting and denying media access to civil records suggests that the overriding public interest requires that the majority of civil records be open to the media.

What Public Interest?

The first question to be raised is what interest the media have in obtaining access to court records and to what extent that access is permitted or denied.

The sorts of cases that support the strongest arguments for media access to court records involve dangerous products and dangerous practices. The media have reported hundreds of cases across the country in which court records have been sealed. These stories disclose instances where the public has been put at risk from dangerous or defective products. They also point to occasions where suits that might reveal these risks have been locked away from the light of day. The stories also point to instances where manufacturers have evaded responsibility by keeping plaintiffs from learning of discoverable evidence and forcing them to play a legal blindman's bluff in the search for relevant evidence.

There are, of course, cases in which compelling interests of the parties and societal goals have formed the basis for nondisclosure. By their nature, they are not highly publicized and so offer little opportunity for example. In any event, the question is not how often court secrecy succeeds in protecting the innocent, but rather how often it fails and how profoundly those failures affect society. The following instances involving secrecy do not discount those valid instances, but rather point to other types of cases in which secrecy poses a greater threat to society than the possible harm to the litigants seeking secrecy.

In 1987 and 1988, *The Dallas Morning News*, *The Washington Post* and *Newsday* all ran multi-part series on secrecy in the court system.[9] In its series that began in Oct. 1988, The *Post* reported about a case involving a Michigan man and the Honda Motor Corp. The suit alleged the plaintiff was permanently disfigured when the car's hood detached from its mounts, passed through the windshield and hit him in the face. The case never came to trial. It was settled and the agreement included a confidentiality provision. The *Post* contacted the plaintiff's attorney, Randolph Friedman, and asked him whether other Honda car owners were denied important information. He replied, "All I can say is that there was a confidentiality order . . . I really can't help you."[10]

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[8] Interview with Justice Nathan Hecht in March, 1990.

[9] Justice Llyod Doggett referred to the Dallas Morning News series in his comments on the new rules on sealing court records in Texas. "Justices OK rules to curb sealing of civil documents." Dallas Morning News, April 17, 1990, p. 16A.

Newsday reported on a case with a similar outcome in its series "Deadly Secrets," that began in April 1988.

> "I've settled a case that involves what I believe may be a dangerous vehicle," says James Gilbert, an attorney in Arvida, Colo. But because of the settlement's secrecy terms, Gilbert adds, "I can't say whether the vehicle is a car or truck. I can't say who makes it. I can't even say which part of the vehicle is involved. And it bothers me because that vehicle is still on the road.[11]

In yet another series of automotive safety cases, the *Post* recounted the tactics employed by General Motors in the aftermath of a series of accidents involving fires linked to the carmaker's gas tank design. "Over the last five years, in defending itself against scores of lawsuits filed by victims of fiery car crashes, General Motors Corp. has used court secrecy procedures throughout the nation to keep closely held and controversial documents about auto safety from becoming public," the newspaper reported in October 1988. The carmaker's strategy kept GM from being linked with car fires as Ford was with its Pinto, which suffered the same sort of design problem. The result was that the existence of damaging documents were not generally known and each plaintiff in turn had to discover, on his own, whether such documents existed and then actively seek them, the newspaper reported.

> In case after case, GM has turned over documents to opposing lawyers only under court-imposed confidentiality orders that prohibit disclosure to anyone else. It has paid millions of dollars to settle cases before trial and, as part of those settlements, has obtained agreements that bar opposing lawyers from discussing what they learned about GM. And in two cases, it has asked judges to punish lawyers who allegedly violated confidentiality orders.[12]

General Motors, like Ford, had a problem with its gas tank placement design. The gas tanks, located near the rear bumper[13], were likely to be punctured in a high-speed crash and that increased the chances of a fuel-fed fire. In 1970, GM officials were told of the risk, the Post reported. A year later, GM considered moving the gas tank to a position over the axle. But that would take some trunk space and cost between $8.59 to $11.59 per car, the newspaper reported. Both the 1970 notification and 1971 decision not to move the gas tanks were documented in company records. In 1973, GM engineers again addressed the issue in a June 29 memo entitled "Value Analysis."

> A GM engineer, Edward C. Ivey, assigned a $200,000 value to each human life and assumed that a maximum of 500 people died annually in GM cars "where the bodies were burnt."
>
> Then, in a two-stage calculation relating to new GM cars, Ivey determined what level of expenditure could be justified to try to avoid the fiery deaths in the 5 million cars GM was producing annually. "This analysis indicates that for GM it would be worth approximately $2.20 per new auto to prevent a fuel fed fire in all accidents."[14]

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[10] "Early Warning Signals on Safety Often Ignored in Rush to Secrecy," The Washington Post, Oct. 23, 1988, p. A22.

[11] "System Thwarts Sharing Data on Unsafe Products," Newsday, April 24, 1988, p. 24.

[12] "Court Secrecy Masks Safety Issues," Washington Post, Oct. 23, 1988, pp. A1-A22.

[13] Cars equipped with rear-position gas tanks featured filler nozzles located behind the rear license plate holder. Carmakers later moved gas tanks to positions near the rear axle, a greater distance from the rear bumper, which had the tendency to be pushed forward to puncture the rear-position gas tank. These models have filler nozzles on the car's rear quarter panels.

[14] "Court Secrecy Masks Safety Issues," Washington Post, Oct. 23, 1988, p. A22.

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The *Post* noted the differences between GM and Ford's handling of their corporate documents in gas tank cases. Ford allowed public release of its documents, which included a Ford analysis that also assigned a value of $200,000 per human life lost in fiery accidents. The Pinto cases and the company's documentation put Ford on the front pages of America's newspapers and the company suffered both in the courts and publicly.

> In February 1978, Ford attracted worldwide attention when a California jury awarded $128.5 million in a Pinto case [. . .] A few days later, GM also lost a trial in Detroit, one of the few fuel-fed fire cases the company took to a jury. But the $2.5 million GM verdict received little notice. GM appealed, claiming that the jury was unfairly influenced by the Pinto publicity, then settled the case confidentially for a lesser amount before the appeal was resolved.[15]

The difference in tactics showed up in marketing as Pinto sales fell and 38 percent of those interviewed in a poll conducted by a New York research firm, "said they had heard Ford cars were somehow unsafe [. . .] Only 6 percent had heard similar allegations about GM."[16] The *Post* noted the continuing public interest involving GM cars with figures from R.L. Polk & Co. that an estimated 39.5 million GM cars were still on the road in 1987. The majority of those cars had their gas tanks in the rear, vulnerable position.

Legal Times reported in February, 1989, that Pfizer, Inc., had tried to keep an internal company report on defective replacement heart valves from public disclosure.

> The internal corporate report supposedly documents that Pfizer continued to produce and sell thousands of mechanical heart valves even after it knew of structural weaknesses and sloppy manufacturing. To date about 165 deaths have occurred because of broken valves, according to the Food and Drug Administration.
>
> Pfizer has already spent tens of millions to settle scores of lawsuits, at least partially because the internal report is considered so damaging, the plaintiffs' lawyers say. Under the terms of the settlements known to have been reached in the past year, the company has paid some plaintiffs more than a million dollars each in return for protective orders that ensure Pfizer documents obtained during discovery remain secret.[17]

Confidentiality and its resultant risk to the public at large is not confined to products. A review of sealed cases by the three newspapers shows that many involve physicians, hospitals and lawyers. Sometimes it is impossible to even know the identities of those involved in litigation as the names become part of the sealing order resulting in cases identified as "Sealed v. Sealed," the newspapers noted. Among those cases reported by the *Post* in which identities were still public was the case of heart surgeon Richard N. Scott, who sued Washington Hospital Center over the hospital's review of three cases in which his patients died. Hospital records concluded Scott's performance "had been a factor in two of the three deaths, and criticized his technical skill in a third case [. . .] A year earlier, another review had concluded that his performance had been a factor in two other deaths. Scott denied fault in the five cases," the newspaper reported. But the controversy was not played out in public court. Both Scott and the hospital agreed to seal the suit and the sole public record of the case "is a file number in Superior Court."[18]

In Dr. Scott's case, the sealing order proved less than ironclad. On March 14, 1990, the D.C. Superior Court ordered that the records on file be unsealed for examination by the District of Columbia Board of Medicine. The Board had attacked the sealing order, saying that the sealed record made it impossible to carry out its "duty to determine the fitness of Dr. Richard N. Scott to continue to practice medicine."[19]

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[15] "Court Secrecy Masks Safety Issues," Washington Post, Oct. 23, 1988, p. A22.

[16] "Court Secrecy Masks Safety Issues," Washington Post, Oct. 23, 1988.

[17] "Legal, Political Fallout From Secret Valve Study," Legal Times, February 6, 1989, pp. 1, 12.

[18] "Secret Filing, Settlement Hide Surgeon's Record," Washington Post, Oct. 26, 1988, pp. A1-A16.

In yet another case involving a hospital, D.C. Superior Court Judge Paul R. Webber III, "approved a $1 million settlement of a malpractice lawsuit against Howard University Hospital, ordered that no one discuss the case and sent the records to a locked file cabinet in the D.C. courthouse, according to sources familiar with the case," the *Post* reported.[20] The case involved a woman who died at the hospital. Among the facts sealed, according to sources contacted by the *Post*, were falsification of the woman's medical records to show the staff had been monitoring her and that a doctor had examined her and an affidavit from a patient that the staff had ignored her attempts to get help for the woman.

Apart from denying the public information about risks posed by these providers of services, the practice of confidentiality also may shield them from accountability, the newspapers said.

> D.C. Superior Court Judge Peter H. Wolf said he sealed the files of a suit that alleged a psychiatrist had violated his professional ethics by engaging in a sexual relationship with a female patient. Wolf said the psychiatrist asked to seal the case, which was settled with no admission of liability, because he was afraid he might lose his license if the suit became public.
>
> "Maybe he should" have lost his license, Wolf said in an interview. "Maybe it is a poor thing for me to go along with that." Wolf would not identify the psychiatrist and said he did not know if the case had been reported to the professional disciplinary board that would investigate such allegations.[21]

Attorney Ronald Karp, who agreed to seal two other malpractice lawsuits involving physicians who allegedly falsified their patients' medical records, said confidentiality orders kept him from notifying medical licensing officials about the allegations. "I presumed that if I did, it would be discussing the case and that would be a breach of the settlement terms," he told the *Post*.[22]

Plaintiff's attorney Les Wiesbrod, quoted by the *Morning News* in its investigation of court secrecy, said that settlement agreements may require plaintiffs to either not complain to regulators or to withdraw their complaints.

Apart from keeping the public from knowing of the potential hazard of GM fuel tank placement, GM's secrecy tactics served to keep victims of fuel-fed fires from acquiring such potentially damaging documents as the Ivey analysis. These measures help ensure that plaintiffs who follow do not benefit from a roadmap for litigation laid out by their predecesors. Such legal advantage is strong reason to keep the news of the existence of documents or even previous, similar dangers from the media.

Why the System Doesn't Work

The defense bar has a strong interest in seeing to it that defendants' legal problems do not become public. Disclosures of information, as noted above, can seriously damage clients' positions in existing suits or by causing additional litigation from other victims who are not aware of the avenue of the courts to obtain satisfaction. Rules of professional responsibility require that attorneys take measures to protect the interests of their clients above others, which can include society as a whole. Washington, D.C., attorney Joseph Montedonicom who has obtained five sealing orders for his clients including Howard University Hospital, told the *Post* that he is obligated to defend even clients he knows have committed a civil wrong. He said the issue of confidentiality versus public interests is not one for lawyers to resolve. "I don't make the ultimate decision. That's up to the judge."[23]

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[19] Scott v. The Washington Hospital Center, Civil Action No. 11174-82 (D.C. 1990).

[20] "Hundreds of Cases Shrouded in Secrecy," Washington Post, Oct. 24, 1988, p. 1.

[21] "Court Secrecy Masks Safety Issues," Washington Post, Oct. 23, 1988, p. A22.

[22] "Court Confidentiality Stymies Disciplinary Probes," Washington Post, Oct. 24, 1988, p. A20.

[23] "Secrecy Boosts Settlements," Washington Post, Oct. 24, 1988, p. A21.

The Canons of Professional Ethics, Canon 15, states,

> The lawyer owes "entire devotion to the interests of his client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.[24]

The authors point out that failure to act with diligence can prejudice a client's rights and such a failure can constitute a basis for a malpractice action. Therefore, a defense lawyer who does not seek a protective order may, in effect, be opening the door to future suits or enabling other similarly situated plaintiffs to take advantage of the enterprising work of a prior plaintiffs' lawyer.

If defendants have strong reasons to keep records from the public, the plaintiffs' bar may also be motivated to aid in that effort. The *Post* reported secrecy played a key role in a suit brought against the makers of baking soda in a suit over an injury caused by using the baking soda to treat indigestion.

> At a settlement conference with the judge, Church & Dwight Co.'s attorney, Richard H. Lewis, complained that a Washington Post reporter had inquired about the case. Lewis said the company would not go forward unless [plaintiff Michael] Webber and his attorneys agreed not to talk about the matter according to a transcript of the July 25, 1984, hearing.
>
> The company was paying "top dollar" to settle, Lewis said, "but part of that reasoning was . . . no one would discuss this matter with the press or anybody else, not only the dollars and cents, but the facts."[25]

But plaintiffs and their attorneys aren't always the victims of pressure by defense lawyers to keep cases secret. In *Newsday*'s series on confidential justice, plaintiffs' lawyers explained why they might want to keep a case quiet. Terrence Coriden, an Ohio attorney, represented a child injured on a piece of playground equipment. Miracle Recreation Equipment, the equipment maker faced federal investigation in connection with numerous injuries to children from the company's merry-go-rounds. Coriden obtained a damaging engineer's report commissioned by the City of Columbus, Ind., that the merry-go-rounds were dangerous.

> But he didn't alert federal officials then, he says, because to do so might have jeopardized the size of the Likens' settlement with Miracle - a settlement reached in 1981 for an amount Coriden declined to disclose.
>
> "A [company's] fear of that kind of information going to a regulatory commission is substantial," Coriden says, "and fear is a way of producing dollars and cents."[26]

The *Post*'s reports illustrated the pressure on plaintiffs' lawyers to agree to secrecy. Jean D. O'Malley said a defendant offered one of her clients a "substantial increase" for settlement in return for an agreement to seal the case involving the death of a 6-month-old child whose illness was not properly diagnosed by a physician. "As a general rule, O'Malley said, 'secrecy is worth money. No seal, no bucks.'"[27] But it is not just the ability to put the squeeze on a defendant that encourages plaintiffs' lawyers to help keep cases quiet. Oliver Heard, Jr., of San Antonio also was quoted in the *Newsday* series and he gave compelling reasons for keeping cases and dangerous products out of the news. Heard said premature disclosure could result in a rash of new suits that could threaten a defendant's ability to pay an agreement or judgment. That was the case for A.H. Robins Co., that produced the Dalkon Shield I.U.D., *Newsday* reported. "Hundreds of women who filed claims against the company went unpaid after the company sought bankruptcy protection in the face of the legal onslaught."[28]

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[24] Stephen Gillers, Norman Dorsen, Regulation of Lawyers: Problems of Law and Ethics, 1985, p. 312. (Little, Brown and Company, Boston 1985).

[25] "Secrecy Boosts Settlements," Washington Post, Oct. 24, 1988, p. A21.

[26] "Legal Merry-Go-Round," Newsday, June 5, 1988.

[27] "Secrecy Boosts Settlements," Washington Post, Oct. 24, 1988, p. A21.

In a series of lawsuits against drug manufacturer McNeil Pharmaceutical over allegations that the company failed to adequately warn physicians about the dangers of its new prescription painkiller Zomax, the company utilized confidentiality orders to limit discovery. In the course of five years of litigation in 43 states, McNeil took cases to trial three times, the *Post* reported. The rest of the time, McNeil settled cases with confidentiality agreements. For plaintiffs' attorneys, the choices were clear, if not palatable.

> Maryland lawyer Steven Nemeroff, who settled a Zomax lawsuit in Baltimore, said generally of lawsuits involving drugs, "The problem is that they have a gun to your head. The client is concerned about being compensated in full. The lawyer must abide by the concerns and wishes of his client . . . not the fact that other victims may be injured."[29]

If attorneys for each side are bound by professional rules that favor confidentiality, then judges are the linchpin in the process of sealing court records. Current practice vests much discretion in the hands of judges. The U.S. Supreme Court noted the need to protect judicial discretion in its decision in *Seattle Times v. Rhinehart*, 467 U.S. 20 (1983)[30]. In *Seattle Times*, the U.S. Supreme Court rejected a proposal that would require a trial judge to find a compelling government interest, draw a narrow protective order and ensure that no less intrusive methods for protecting arguably protectible records exist. "We think the rule urged by petitioners would pose an unwarranted restriction on the duty and discretion of a trial court to oversee the discovery process."[31] Trial court discretion often is cited by proponents of restrictions on access.

Among those arguing for ease of record sealing, the Texas Association of Defense Counsel cited trial court discretion in its opposition to the, then-proposed Texas rule to make sealing court records more difficult. The association wrote to the Supreme Court in opposition to the move. In its letter, written by J. Gordon McHaney of the Austin law firm of Lea & Chamberlain, the association argued that, "[a]s with many other trial matters, substantial discretion should be vested in the trial court. Such will insure that the trial judge will have the particular facts of each case in order to make a proper decision."[32] Such discretion was at the heart of *Times Herald Printing Co. v. Jones*, 717 S.W.2d 933 (Tex.App. - Dallas 1986). *Times Herald* involved a suit by the *Dallas Times Herald* to gain access to the orders, opinions and nondiscovery pleadings that then-95th District Judge Nathan L. Hecht ordered sealed.

The case that prompted the *Times Herald* suit involved Dr. Wayne C. Jones, a Richardson psychiatrist. Jones was accused of having sexual relations with a patient, overprescribing drugs for her and charging her more than $24,000 in the period from 1976 to 1980.[33] Hecht, now a member of the Texas Supreme Court and the court's liaison to the Supreme Court advisory board on proposed rules for sealing court records, used his discretion as the presiding judge to seal the file in order to aid settlement of the case.

> That was my reading of the law at that time with respect to court records, [. . .] and I did apply abuse of discretion standard, weighing, finding no constitutional interest on either side and

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[28] "Legal Merry-Go-Round," Newsday, June 5, 1988.

[29] "Drug Label Warnings at Issue in Suits," Washington Post, Oct. 25, 1988, p. A12.

[30] This case arose after the Seattle Times published several stories about the leader of a religious group. The leader responded with a defamation and violation of privacy suit. The newspaper sought to obtain lists of the group's membership for publication which the newspaper as defendant had obtained in the course of discovery. The trial court issued a protective order preventing the newspaper defendant from disseminating the lists and the newspaper responded with an appeal of the protective order.

[31] Seattle Times v. Rhinehart, 467 U.S. 20 (1984), at p. 31.

[32] November 17, 1989, letter from J. Gordon McHaney of the law firm of Lea & Chamberlain to Charles Herring Jr., co-chairman of Texas Supreme Court Ad Hoc Subcommittee on Sealing of Court Records of the Texas Supreme Court Advisory Committee.

[33] "Sealed Lawsuits deal with poisonings, sex, surgery," Dallas Morning News, Nov. 23, 1987, pp. 1A, 8A.

simply weighing the competing interest of the parties on one hand, who had agreed to sealing, sealing in that case, the court's interest in giving force to the agreement of the parties, the justice system, the public's interest in knowing what goes on in trial, weighing all those interests without any specific guidance as to what the standard was applicable.[34]

Some jurisdictions have been very accommodating when it comes to sealing court records, the news media have reported.

In its 1987 series, the *Dallas Morning News* found 282 cases that were sealed by state court judges in Dallas.[35] The newspaper reported that 202 of the cases had been sealed since 1980 compared to 49 from 1971 to 1980, 15 from 1961 to 1970 and 16 for the 40 years from 1920 to 1960. Five Dallas County judges accounted for 80 of the sealed cases with Judge Gary B. Hall sealing 19, the most for any judge in the period. In an interview with the newspaper, Hall discounted the notion that sealing court records was a practice intended to aid only attorneys. "It's not only the attorneys that we're pleasing, it's the clients. It's the beauty of people leaving our courts pleased, with a smile on their faces because they're happy."[36] Hall explained that he asks lawyers why they want records sealed, but as the *Morning News* reported, "in a very small portion of them do I disagree."[37]

The *Morning News* also reported Hall saying that the practice of sealing records promoted resolution of disputes, explaining that a sealed record can help litigants by avoiding the uncertainties of jury trials, promotes court efficiency by reducing the number of cases and eliminated the cost of actual trial. Hall pointed to the power of judges to seal records in their courts.

Dallas is not the only Texas jurisdiction where attorneys have found it easy to seal records. Texas Supreme Court Justice Lloyd Doggett, quoted in the *Austin* (Texas) *American-Statesman* in December 1989, said he found 118 cases sealed by Travis County[38] district judges. "It is clear that we need to act and act quickly, so that judges will have a rule before them specifying what can and what cannot be sealed," Doggett said, the newspaper reported.[39]

And Texas is not the only part of the country where the sealing of civil records has become easy. The *Washington Post* reported in its four-part article beginning in Oct. 1988 that at least 200 lawsuits had been sealed by judges in the District of Columbia and its surrounding communities. The newspaper cited hundreds more cases where judges had issued confidentiality orders pertaining to discovery.

> Such secrecy procedures - once used almost exclusively in cases involving business trade secrets, national security and personal privacy - are increasingly being used to prevent debate about critical problems of public safety and policy. Those who have sought to take advantage of secrecy procedures include corporations, hospitals, doctors, lawyers and law firms.[40]

The *Post* reported an absence of standards and rules for sealing cases and records for both local and

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[34] Interview with Nathan Hecht on March 12, 1990.

[35] "Secret lawsuits favor wealthy, influential," Dallas Morning News, November 22, 1987, pp. 1A, 24A-25A. None of the 282 cases cited by the Morning News involved adoption or juvenile delinquency cases, whose records are controlled by existing state statute.

[36] "Judge says privacy can help settle suits" "To jurist, public's right to know is secondary to achieving justice," Dallas Morning News, November 22, 1987, p. 24A.

[37] "Judge says privacy can help settle suits" "To jurist, public's right to know is secondary to achieving justice," Dallas Morning News, November 22, 1987, p. 24A.

[38] Travis County, Texas, is the location of the state capitol of Austin.

[39] Justice Doggett's office explained that the number came from the district clerk's office in response to a request for the number of sealed cases on file. The types of cases were not indicated. From a check with Justice Doggett's office on March 29, 1990.

[40] "Hundreds of Cases Shrouded in Secrecy" "Area Suits Often Sealed With Few Queries," Washington Post series "Public Courts, Private Justice."

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federal courts. "Judges follow no set procedures, ask few probing questions, offer no notification to the public and often put nothing in the public court records to explain their reasoning in deciding to seal files," the *Post* reported.[41] Both judges and lawyers interviewed told the *Post* that most judges consider themselves referees monitoring disputes between private parties and so rarely disapprove a request to seal records. The newspaper quoted Chief Judge John J. Mitchell of the Montgomery County Circuit Court as saying, "There isn't any great objection to it," and Chief Judge Lewis Griffith of the Fairfax County Circuit Court saying, "Normally the court honors the request."[42] The *Post* discovered that the judges granting the sealing orders sometimes are not clear as to the scope and effect of the orders they issue.

> When D.C. Superior Court Judge Eugene Hamilton was told that he is listed as sealing the records in five cases, including two medical malpractice matters, he said: "Is that right? The whole suit? Including the names of the plaintiffs and so forth?"
>
> Hamilton said he assumed that his secrecy orders only applied to the amounts of money paid out as part of the settlements, but said it was "never too clear" to him what else would be covered.[43]

Another D. C. Superior Court Judge, Peter H. Wolf told the *Post* that he does not perceive problems with sealing records when both sides agree to the motion. "I've never given it too much thought if it's not opposed," he said.[44]

That attitude demonstrates the lack of judicial scrutiny of the sealing process and a failure to determine whether agreements to seal are the result of reasoned thinking about the public policy implications of sealing, an agreement to raise the size of the settlement or accession to one party's demands. "This is not to say that public policy should not intrude, of course, but I may approve for or five or six such things before I say, 'Wait a minute,'" Wolf told the *Post*.[45]

Judges may realize a public interest not to seal records but be faced with effective legal maneuvers that overcome such consideration. These may include threatening the court with requiring examination of each document to determine a protected right such as trade secrets or simply putting pressure on a judge to agree, as the Post reported in its series.

> At a Sept. 13, 1985, hearing, GM attorney W. Richard Davis told a Texas state judge that he was willing to fight for confidentiality on "a document-by document approach until Christmas." The judge, David Peeples of San Antonio, replied: I don't relish the prospect of looking at 15,000 documents."
>
> Peeples imposed a broad protective order, rejecting a less restrictive proposal from the plaintiffs' attorney David Perry, who wanted permission to share the material with other attorneys suing GM and to release documents to "governmental agencies who may be investigating fuel system integrity matters."[46]

In yet another GM case, this time in Kansas, the company sought to seal the entire trial record and exhibits from a case tried in open court. "The plaintiffs' attorneys objected strenuously, but [Judge James] Buchele acceded to GM's request. "General Motors was making a big deal about it . . .," he said in an interview. "One way or another,

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[41] "Court Confidentiality Stymies Disciplinary Probes," Washington Post, Oct. 24, 1988, p. A20.

[42] Ibid.

[43] Ibid.

[44] "Court Secrecy Masks Safety Issues," Washington Post, Oct. 23, 1988. p. ().

[45] Ibid. At p. ().

[46] Ibid. The case eventually reached the Texas Supreme Court in Garcia v. Peeples, 734 S.W.2d 343 (Tex. 1987) and the court rejected the broad, blanket protective order. The court went so far as to speak in favor of shared discovery as will be discussed later below.

I just wanted to get it out the door."[47]

That discretion was behind the move that resulted in the new Rule 76a regarding sealing of records in Texas courts. The Texas Legislature passed a measure in 1989 requiring that the Supreme Court of Texas consider a rule on record sealing. State Representative Orlando Garcia of San Antonio introduced and sponsored the bill after he encountered the practice of sealing court records in his district, said Roberto Vazquez, a Garcia legislative aide. Vazquez explained that a suit had been brought on the basis of claims that a priest had molested several youths. Vazquez said the archdiocese intervened in the suit and the public was kept in the dark.[48]

"So what they did is offered them a big old chunk of money and nobody ever knew what had happened," he said. "We felt like the newspapers ought to have access."[49]

Vazquez pointed to the lack of rules governing the process of sealing court records. "Right now you can seal records arbitrarily depending on the judge and the mood he's in."

In its decision, the appellate court also addressed a key feature of the Rule 76a, which allows nonparties to intervene in a sealing decision and provides for continuing jurisdiction by the court over a sealing order even after the suit has concluded.

> Under the facts before us, we hold that the intervention was untimely, and therefore, the trial court had no choice but to deny it. We do not reach the merits of relators' contention regarding right of public access to the record of the proceedings where it was not before the trial court because "an appellate court may not deal with disputed areas of fact in a mandamus proceeding."[50]

The Constitutional Issues

The question of media access to civil court records falls into two main categories: (1) whether there exists a general right of access to civil court records and (2) what preferential position, if any, the media occupy that would grant them greater access to such records?

General Access

The U.S. Supreme Court has not decided the general issue of media or public access to civil proceedings. Therefore, the following analysis rests on a combination of the holdings in civil and criminal cases with an examination of central themes that arguably can be applied to civil proceedings. In framing the question of media access, we turn first to the concept of First Amendment rights in the context of government regulation.

Consider the reasoning of the U.S. Supreme Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The case centered on a corporation's right to expend money in publicizing its views on a Massachusetts constitutional amendment based on the First Amendment guarantee of freedom of speech and of the press. While the suit did not directly deal with the issue of access to court records, it does provide a foundation for an examination of the issue. The case dealt with a right to participate in public discussion. Discussion, to be meaningful and effective, requires information, the court explained. That, in turn provides a basis for promoting the fullest access to the very information needed for these discussions.

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to

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[47] Ibid. At p. ().

[48] The case was the subject of a petition for writ of mandamus brought by the San Antonio Express-News in Express-News v. Spears, 766 S.W.2d 885 (Tex.App. - San Antonio 1989). The motion for intervention was denied because it was filed after final judgment had been entered in the case. The suit in question was a civil action for damages to two minor children their parents and brother. The two children allegedly were fondled by Federico Fernandez, a Franciscan Friar indicted on two counts of indecency with a child.

[49] Telephone interview with Roberto Vazquez on March 30, 1990.

[50] Express-News Corp. v. Spears, 766 S.W.2d 855 (Tex.App. -- San Antonio, 1989), at 888.

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cope with the exigencies of their period.[51] *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940)."[52]

The court addressed the particular interest of the media in maintaining this freedom of discussion. "The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate."[53] And in an arguably relevant passage, the court noted the value of free access by the media, saying, "that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[54]

In *Thornhill v. Alabama*, 310 U.S. 88 (1940), the court addressed the general import of the First Amendment for the general populace. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[55] The court took up the issue of the First Amendment and its relationship to government in *Mills v. Alabama*, 384 U.S. 214 (1966).

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated [. . .]
>
> Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they selected to serve.[56]

At the state level, trial judges commonly are elected by the populace. A system allowing the concealment of agreements and the judicial process over which these judges exercise continuing authority, must prevent the electorate from knowing how the judge is handling matters of public concern.

Further, the Sixth Amendment guarantee of a public trial would require that proceedings be open to the public either through open court proceedings or press access to those proceedings as representatives of the public. The court dealt with the issue of openness as is related to the media in court proceedings in *Estes v. Texas*, 381 U.S. 532 (1965). "The free press has been a mighty catalyst in awakening public interest in government affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences including court proceedings."[57]

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[51] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), at p. 776.

[52] Thornhill v. Alabama, 310 U.S. 88 (1940), dealt with an Alabama statute making it unlawful for persons, without just case to loiter near a place of business with the intent to induce other persons from dealing with that business.

The court, in deciding the statute was invalid on its face, said, "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of punishment." Stromberg v. California, 283 U.S. 359; Near v. Minnesota, 283 U.S. 697; Lovell v. Griffin, 303 U.S. 444; Hague v. C.I.O., 307 U.S. 496; Schneider v. State, 308 U.S. 147.

[53] Ibid. At p. 781.

[54] Ibid. At p. 783.

[55] Thornhill v. Alabama, 310 U.S. 88 (1940), at p. 102. Thornhill dealt with an Alabama statute forbidding picketing at places of businesses. Although not directly implicating the issue of dangerous products and risky services, the court's language makes it clear that changing times give constitutional importance to varying subjects. "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." At p. 102.

[56] Mills v. Alabama, 384 U.S. 214 (1966), at pp. 218-219.

The court noted the fears of secret court proceedings relating to the unequal power of the government and its subjects. This inequality of resources lies at the heart of many court sealings. The GM gas-tank cases point to the power of a multinational corporation with its squadrons of attorneys in keeping discoverable material from being disseminated among similarly situated plaintiffs. That tactic resulted in many cases being decided or settled on the basis of an partial examination of the relevant facts.

The Texas Supreme Court directly addressed the issue in *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987). The case involved a claim against General Motors for injuries resulting from a gas-tank fire in an automobile accident. General Motors obtained a protective order from trial judge David Peeples of San Antonio for documents obtained in discovery.[58] In rejecting the protective order and allowing Garcia to share discovery material with other plaintiffs' attorney, the court noted the dangers to the achievement of justice inherent in modern discovery practices.

> The truth about relevant matters is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise. Courts across the country have commented on the lack of candor during discovery in complicated litigation.[59]

The Texas court also noted the United States Supreme Court's view in *United States v. Proctor &B Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), that discovery was intended to "make trial less a game of blindman's bluff and more a fair contest with the basic issues of fact disclosed to the fullest practicable extent."[60]

The United States Supreme Court addressed the underlying issue of access to court records in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The court faced the question of whether the trial court erred in denying broadcasters those parts of the actual tapes played during the Watergate trial. Justice Powell examined the competing interests in access.

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.[. . .]
>
> The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies.[61]

However, Powell noted that the right was not absolute. He cited existence of the power of the individual courts over their own records.

> [f]or example, the common-law right of inspection has not bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.'[. . .]
>
> Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption [. . .] or as sources of business information that might harm a

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[57] Estes v. Texas, 381 U.S. 532 (1965), at p. 539.

[58] Among the terms of the protective order, was the instruction that "[t]he documents and any other materials produced shall not be available for inspection by any individuals other than [Garcia], [Garcia's] counsel, and any judge having jurisdicition of this matter (. . .) Any notes, memoranda, identification or index relating to the documents or other materials prepared by any authorized person herein shall not be disseminated and are tobe solely in connection with the matter of Manuel Garcia, Sr., etc. et al. v. General Motors Corporation, et al.

[59] Garcia v. Peeples, 734 S.W.2d 343 (Tex. 1987), at 347.

[60] Ibid.

[61] Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), pp. 597-598.

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litigant's competitive standing.[62]

However, the examples noted in the newspaper investigative series above do not fit into the list of the sorts of information that Powell found excludable. "Private spite," "libelous statements" and harmful business information are far afield from the concerns involved in dangerous placement of gas tanks, exploding cigarette lighters and professionals who abuse the trust with which they have been entrusted.

Powell was unable, through the cases preceding *Nixon*, to craft a complete definition of the common-law right of access. Further, he could not draw a list of factors to be considered in deciding what materials would be subject to such access. Powell noted that the cases concerning the right of access had left the matter to the trial court's discretion. "The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in the light of the relevant facts and circumstances of the particular case."[63]

And yet, anecdotal information such as that already presented in this paper indicates that for many trial court judges, the question of nondisclosure is simply a matter of attorney request to the court. When a judge balks, he is likely to be forced into submission by threat of burdensome procedure. And, as noted above, in some cases, judges have admitted that they are not even aware of the scope of the protective orders that they grant.

Powell also addressed the First Amendment claim of right to access, rejecting any superior rights for the media.

> The First Amendment generally grants the press no right to information about a trial superior to that of the general public. "Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door, and within, a reporter's constitutional rights are no greater than those of any other member of the public.[64]

Powell rejected the analysis of the earlier case of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), in which the court held that the First Amendment prevented a prohibition of publication of information in the public domain in official court records.

> "Our decision in that case merely affirmed the right of the press to publish accurately information contained in court records open to the public. Since the press serves as the information-gathering agent of the public, it could not be prevented from reporting what it had learned and what the public was entitled to know."[65]

The court addressed the question of the Sixth Amendment right to public trial in relation to the request that the Nixon tapes be made available to the public. "The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and report what they have observed."[66]

Preferential Access for the Media

Beginning in 1979 the Supreme Court turned away from its equal treatment to a preferred First Amendment right of access. In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Supreme Court dealt with media access to court proceedings. The case involved the closure of a pretrial hearing in a criminal case. Although the majority of the court found that the Sixth Amendment right to a public trial belonged to the defendant and not the press[67], four justices did agree that the press had a Sixth Amendment right of access. Further, Justice Powell found a First Amendment right of access for certain cases.

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[62] Ibid.

[63] Ibid. At p. 599.

[64] Ibid. At p. 609.

[65] Ibid. At p. 609.

[66] Ibid. At p. 610.

> I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial supression hearing. [. . .][T]his constitutional protection derives, not from any special status of members of the press as such, but rather because "[i]n seeking out the news the press . . . acts as an agent of the public at large," each individual member of which cannot obtain for himself "the information needed for the intelligent discharge of his political responsibilities."[68]

But it was *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) that established clearly a First Amendment right of access. *Richmond* was another criminal case and the issue centered around the presiding judge's decision to close the courtroom during a criminal trial. *Richmond Newspapers* was followed in 1986 by *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1 (1986) (known most commonly as *Press-Enterprise II*), which explained the right of access.

The *Richmond* court voted 7 to 1 to reverse the closing. Justice Burger pointed to the history and rationale that kept criminal trials open for hundreds of years.

> The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself [. . .] In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.[69]

Chief Justice Burger's opinion then included reference to the prohibition on the government to limiting information to the public contained in *First National Bank of Boston v. Bellotti*.[70]

The court addressed the claim, that it itself had made previously, that since the Constitution did not guarantee the right of the public to attend trials, there was no such right. The opinion held that rights not enumerated were not precluded from recognition as important.

> Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. [. . .]
>
> We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." *Branzburg*, 408

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[67] The court cited In re Oliver, 333 U.S. 257 and Estes v. Texas, 381 U.S. 532, saying, "both the Oliver and Estes cases recognized that the constitutional guarantee of a public trial is for the benefit of the defendant. There is not the slightest suggestion in either case that there is any correlative right in members of the public to insist upon a public trial. Gannett Co. v. DePasquale, 443 U.S. 368 (1979), p. 381.

[68] Gannett Co. v. DePasquale, 443 U.S. 368 (1979). Justice Powell quoted from his dissenting opinion in Saxbe v. Washington Post Co., 417 U.S. 843 (1974) at 850 and 863 as well as First national Bank of Boston v. Bellotti, 435 U.S. 765 (1978) at 776-778.

[69] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) at 575.

[70] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) at 783.

U.S., at 681.[71]

Justice Brennan, with Justice Marshall concurring, also cited the history of open criminal trials and added the view that the First Amendment required open court proceedings. The First Amendment "embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of government."[72] Here Brennan's concurrence included a balancing approach in deciding what matters justifiably should be open and what matters should be closed. "[P]ublic access to court proceedings is one of the numerous "checks and balances" of our system, because "contemporaneous review in the form of public opinion is an effective restraint on possible abuse of judicial power."[73]

In addition, Brennan's analysis turned on a First Amendment consideration of the right of public discussion and involvement in the process of government. "[I]n upholding a privilege for reporting truthful information about judicial misconduct proceedings, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), emphasized that public scrutiny of the operation of a judicial disciplinary body implicates a major purpose of the First Amendment - "discussion of governmental affairs," *id.*, at 839.[74]

A portion of Justice Brennan's concurrence is significant for purposes of our consideration of access to civil proceedings.

> Finally with some limitations, a trial aims at true and accurate factfinding. Of course, proper factfinding is to the benefit of criminal defendants and of the parties in civil proceedings. But other, comparably urgent, interests are also often at stake. A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society. Also, mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant. Facilitation of the trial factfinding process, therefore, is of concern to the public as well as to the parties.
>
> Publicizing trial proceedings aids accurate factfinding. "Public trials come to the attention of key witnesses unknown to the parties." *In re Oliver, supra*, at 270 [. . .][75]

Press Enterprise II involved a state court's decision to close a 41-day preliminary hearing in a multiple-murder case brought against a nurse. The court, in an opinion by Chief Justice Warren Burger, repeated the holding that "The right to an open public trial is a shared right of the accused and the public."[76] And while the court acknowledged that some aspects, most notably grand jury proceedings, of justice require secrecy, "Other proceedings plainly require public access."[77]

The court did acknowledge that there were some otherwise public access situations where other rights might take precedence. First cited, is the right of the defendant to a fair trial when that right might be undermined by publicity. The court also noted in a footnote that persons other than the defendant might also have an interest. "The protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding."[78]

But the court hewed to the philosophy that made California's preliminary hearings subject to the qualified

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[71] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), pp. 579-580.

[72] Ibid. At p. 587.

[73] Ibid. At p. 592. Brennan cites In re Oliver, 333 U.S. 257 (1948) at 270.

[74] Ibid. At p. 592.

[75] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), pp. 596-597. Emphasis added.

[76] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986), at 7.

[77] Ibid. At 9.

[78] Ibid. At 9, fn. 2.

First Amendment right of access to criminal proceedings.

Despite these case references to access to court proceedings, the Supreme Court has not decided the ultimate issue of media access to civil proceedings. *In re Reporters Comm. For Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985). "No Supreme Court decision deals with the precise issue of the public's First Amendment rights to court records in civil cases."[79] The D.C. Circuit examined the history of press access in criminal cases from *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), through *Globe Newspaper Co. v. Superior Court*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501; and *Waller v. Georgia*, 467 U.S. 39 (1984).[80] "The principle has not yet been applied to access to civil trials (though the Court has perhaps intimated that it obtains there, see *Richmond Newspapers*, 448 U.S. at 580 n. 17, 100 S.Ct. at 2829 n. 17), much less to access to records in civil trials - or, for that matter, even records in criminal trials."[81]

The note to which the D.C. Circuit referred to in *In re Reporters Committee*, states,

> Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.[82]

This note becomes significant when placed in the context of the decision of the court to reverse the closure of the criminal trial in that case for that decision relied heavily on the English tradition of open trials and the American extension of that process. "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[83]

The court quoted Jeremy Bentham on the pivotal nature of public involvement in a system of justice.

> "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 1 J. Bentham, Rationale of Judicial Evidence 524 (1827).[84]

The Court also took note of Bentham's encouragement of openness that served to spark the efforts of the participants, shield the judge from suggestions of dishonesty and educate the public.

That the public considers secrecy a veil for inefficiency, incompetence and mistakes by public officials is not necessarily a foregone conclusion. However, on March 12, 1988, *Editor & Publisher*, a weekly newspaper trade publication, reported the results of a survey on American attitudes toward government secrecy. The survey, conducted by the Roper Organization, found that the majority of those surveyed believed the government too secretive.

> According to the survey, commissioned by People for the American Way and released with a report on government secrecy, 68% of those surveyed said the government was not open enough, compared with 27% who said it was. Better than half - 52% - said government secrecy had increased in recent years and 60% said they wanted government to work "aggressively" to

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[79] In re Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985), at 1331.

[80] Richmond Newspapers dealt with the right to observe criminal trial proceedings, Globe Newspaper Co. continued that right with no exception for victims in rape trials, Press-Enterprise added voir dire proceedings and Waller extended the right to evidence supression hearings.

[81] In re Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985), at 1331.

[82] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), at p. 580.

[83] Ibid. At p. 573.

[84] Ibid. At 569.

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> open the information spigot.
>
> The survey of 1,017 adults found that 84% said it was "very important" for citizens to be informed. Large majorities agreed information was needed for Congress to oversee government, to prevent waste and abuse, and to produce better law and policy.[85]

Even so, without a clear Supreme Court statement, the lower federal courts have divided over the issue of access to civil proceedings under the First Amendment. The cases holding that the First Amendment does grant a right of access to civil proceedings are *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984) and *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). *Publicker* dealt with the closing of a hearing on a preliminary injunction, the sealing of the hearing transcript and orders to the attorneys appealing in the case not to reveal "confidential information" contained in their opponents memorandum of law.

The Third Circuit employed much of the reasoning contained in Chief Justice Burger's opinion with references to the history of open trials, the context of the Bill of Rights and tradition rights of access for the public to exercise their First Amendment rights. The court noted that Burger disclaimed any pronouncement on the question of a First Amendment guarantee to attend civil trials, but examined the question in light of the same considerations given in *Richmond Newspapers* and *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596.

The Third Circuit repeated Chief Justice Burger's footnote from *Richmond Newspapers* that "historically both civil and criminal trials have presumptively been open."[86] The court then recited a litany of legal history including Sir Edward Coke, Sir Matthew Hale, William Blackstone as well as American examples of openness in civil proceedings.

> We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call "one of the essential qualities of a court of justice," [. . .] was not also an attribute of the judicial systems of colonial America."[87]

The court also cited Justice Stewart's observation in the same case that, "[f]rom the beginning, the norm was open trials. Indeed, the 1677 New Jersey Constitution provided that any person could attend a trial whether it was "civil or criminal."[88] And, finally, to support its conclusions as to the right of access, the court quoted Justice Powell's declaration in *Nixon v. Warner Communications* that, [i]t is clear that the courts of this country recognize a genera right to inspect and copy public records and documents, including judicial records and documents."[89]

The court explained its conclusions with an exposition on the nature of the democratic system in the United States citing *United States v. Mitchell*, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc., supra,* 435 U.S. 589, at 597. "Any attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have a right of access."[90] The court also quoted Justice Oliver Wendell Holmes in an opinion he delivered as a justice on the Massachusetts Supreme Court.

> It is desireable that the trial of {civil} causes should take place under the public eye, not because the controversies of one citizen with another are matters of public concern, but because it is of the highest moment that those who administer justice should always act under the sense

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[85] *Editor & Publisher*, March 12, 1988, at p. 31.

[86] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, (1980), at 580.

[87] *Ibid*. At pp. 566-567.

[88] *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), at p. 386, n. 15.

[89] *Nixon v. Warner Communications*, 435 U.S. 589 (1978), at p. 597.

[90] *Ibid*. Quoting *Ex parte Drawbaugh*, 2 App.D.C. 404 (1804), at p. 407.

NAACP v. Alabama, 377 U.S. 288, 307.[97]

But the claim for privacy arising under *Griswold* appears questionable at best when considering the nature of the case and the court's restrictions on that penumbra of privacy in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). That case, involving the prosecution of the operators of an adult movie theater, included a defense claim of a right to privacy of the theater patrons. Chief Justice Burger, delivering the opinion of the court, rejected the claim, saying, "It is unavailing to compare a theater open to the public for a fee, with the private home of *Stanley v. Georgia*, 394 U.S. 557[98], at 568, and the marital bedroom of *Griswold v. Connecticut*[99], at 485-486."[100] Further, the court delineated the areas that were proper subjects for that right of privacy. "This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. Cf. *Eisenstadt v. Baird*, 405 U.S. 438, 453-454 (1972).[101] While the court noted that the privacy concern attached to the relationship and not the place, it did put restrictions on how far that privacy would stretch. "Obviously, there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner or a theater stage."[102]

In *Billings v. Atkinson*, the Texas Supreme Court dealt with the tortious invasion of privacy by an employee of a local telephone company who used a wiretapping device on a private phone line. The case is significant in that it includes a detailed explanation of the nature of the privacy right.

> A judicially approved definition of the right of privacy is that it is to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. 62 Am.Jur.2d, Privacy @ 1, p. 677, and cases cited.[103]

But the protection of private activities cannot extend to public sales of goods or the provision of services to the public. The language of *Thornhill v. Alabama*, 310 U.S. 88 (1940), indicated that the Supreme Court is unwilling to uphold an umbrella of protection for particular public interest activities in the name of private relations. "The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern."[104]

Also, in the realm of court proceedings, the U.S. Supreme Court ruled in *Craig v. Harney*, 331 U.S. 367 (1947), that trials are public. In *Craig*, the court dealt with a contempt conviction of three newspapermen following a scathing editorial and news stories about a court proceeding in Nueces County, Texas. In reversing the lower court, Justice Douglas wrote, "A trial is a public event. What transpires in the court room is public property."[105] The holding was repeated in Justice Brennan's concurrence in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) at p. 593.

Richmond Newspapers dealt with the closure of a defendant's fourth trial on the same murder charge. The

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[97] Ibid. At p. 485.

[98] Stanley v. Georgia, 394 U.S. at 557.

[99] Griswold v. Connecticut, 381 U.S. 479 (1965).

[100] Paris Adult Theatre I. v. Slaton, 413 U.S. 49 (1973).

[101] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), at p. 66.

[102] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), at p. 67.

[103] Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex. 1973).

[104] Thornhill v. Alabama, 310 U.S. 88 (1940), at 103.

[105] Craig v. Harney, 331 U.S. 367 (1947) at p. 374.

> of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[91]

The court found that while the First Amendment right of access to civil trials was not absolute, it was worthy of the same "due process protection that other fundamental rights enjoy."[92] And in line with previous holdings in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) and *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), the court said, "to limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest."[93]

The federal courts are not alone in addressing the issue of access. State courts also are competent to address the issue, based either on the First Amendment or readings of their own state constitutions.

Arguments Against Openness

In late 1989, the Texas Association of Defense Counsel sent a letter to the Supreme Court Ad Hoc Committee on sealing court records. The letter, written by J. Gordon McHaney of the Austin law firm of Lea & Chamberlain, expressed the association's reservations about adopting a rule making it more difficult to seal court records. The defense bar in its comments on the then-proposed rule to regulate the sealing of court records in Texas cited three major concerns when defending the practice of sealing court records: (1) privacy interests of the parties, (2) encouragement of settlement and (3) protection of those aspects of litigation that traditionally were subject to sealing, such as trade secrets and matters of family law.[94]

Privacy vs. Public Interest

The defense bar's claim of a right of privacy is encompassed by the U.S. Supreme Court and the Texas Supreme Court in the cases of *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). *Griswold* dealt with the right of privacy attaching to married couples in their own home while *Billings* centered on the invasion of privacy from the installation of a wiretapping device on a family's private telephone.

In *Griswold*, the court dealt with "protection against government invasions 'of the sanctity of a man's home and the privacies of life.'"[95] The court found a First Amendment "penumbra where privacy is protected from governmental intrusion."[96]

> The present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

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[91] *Cowley v. Pulsifer*, 137 Mass. at 394. (??)

[92] *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (1984), at p. 1070.

[93] *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (1984), at p. 1070.

[94] November 17, 1989, letter from J. Gordon McHaney of the law firm of Lea & Chamberlain to Charles Herring Jr., co-chairman of Texas Supreme Court Ad Hoc Subcommittee on Sealing of Court Records of the Texas Supreme Court Advisory Committee.

[95] *Griswold v. Connecticut*, 381 U.S. 479 (1964), at 484.

[96] *Ibid*. At p. 483.

court's analysis by Chief Justice Warren Burger focused on the public nature of the criminal trial from pre-Norman Conquest when cases in England were brought before the freemen of a particular community in moots through the development of the jury system following the Conquest. The court also cited the tradition of open trials in Colonial America and found a presumption of openness in criminal trials. "This is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial."[106]

In 1989, the Supreme Court dealt with the privacy issue in a case arising out of the publication of a rape victim's name by a Florida newspaper. In *The Florida Star v. B.J.F.*, 16 Med. L. Rptr. 1801 (1989), the court held that the newspaper could not be held liable for its publication of the rape victim's name. In its opinion, which the court took pains to limit to the facts of this particular case, the justices held, "Publication of truthful information concerning matter of public significance can be punished only if necessary to further state interest of highest order, and no such interest is served by imposing civil damages liability {. . .} against newspaper for publishing rape victim's name {. . .}."[107]

Still another claim made by supporters of easy closure is that civil cases are matters between private individuals and do not implicate concerns about the actions of government. Southern Methodist University Journalism Professor David McHam addressed that issue in *Secrecy in the Public Domain*, a report on protective orders and sealed records. "The courts of the state of Texas are established and administered from public funds with the consent of the people. For that reason, the citizenry should not be asked to relinquish their access to what is and must remain a public concern."[108] The issue has been dealt with by the courts in a collateral manner in discussions of the right of the public to have access to the operations of the public courts in order to observe the conduct and performances of the justice system generally and judges in particular. These discussions are included in the general access portion of this paper. Finally, the claim of private dispute cannot hold when the parties rely on the power of the courts to enforce rights involved in litigation. Discovery, for instance, is a creation of the legislature and judiciary. Settlement agreements are filed with the courts in order to preserve the record if future disputes arise. And, parties turn to the courts to enforce settlement agreements when disputes arise, thus invoking the power of the courts.

Embarrassment and the Party

In what can be taken as a corollary to the privacy interests advanced by the opponents of access, questions of embarrassment sometimes are advanced in support of secrecy. The Virginia Supreme Court addressed that claim in *Shenandoah Publishing House, Inc. v. Fanning*, 368 S.E.2d 253 (Va. 1988). A media intervenor challenged protective orders in a wrongful death case involving health care providers that covered discovery, pleadings and all records including settlement.

The court first found a presumption that court records were subject to public access. Although the court noted prior state and federal cases on point, it came to its conclusion based on Virginia statute that, "[t]he records and papers of every court shall be open to inspection by any person[. . .]."[109] Further, the court found that a party seeking a protective order had to establish an interest that would be so compelling that it could not be protected by any means other than the protective order. Such was not established in the case, the court held.

> "The claims made in the pleadings," the trial court felt, "probably would reflect adversely upon the professional reputations of the . . . defendants, with financial and possible emotional consequences."
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> On appeal the parties agree that the desire of the litigants is not sufficient reason to override the presumption of openness. Nor do we believe that risks of damage, or financial harm, stated in the abstract, constitute sufficient reasons to seal judicial records.[110]

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[106] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

[107] The Florida Star v. B.J.F., 16 Med. L. Rptr. 1801 (1989).

[108] David McHam, Secrecy in the Public Domain, The Texas Policy Research Forum, 1990, at p. 1.

[109] Shenandoah Publishing House v. Fanning, 368 S.E.2d 253 (Va. 1988).

[110] Ibid. At p. 256.

The U.S. District Court in the Eastern District of Arkansas encountered another claim for protective order based on embarrassment or annoyance in a wrongful death suit brought against Ford Motor Co. *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1986). Ford sought a protective order in the context of discovery claiming protection under Federal Rule of Civil Procedure 26, which allows for protective order to protect parties or persons from, among other things, "annoyance" or "embarrassment." Ford sought a protective order for customer complaints about a problem with its cars spontaneously going from park to reverse. "Ford believes that a protective order is necessary because the information requested consists of unverified and self-serving complaints. According to Ford, public disclosure of this information would be both misleading and harmful to its reputation."[111] However, the court disagreed, saying that Ford had not met a threshold burden to require the protective order.

> Where a party will suffer unreasonable annoyance or embarrassment, protective orders should be granted. A mere showing of some embarrassment, annoyance or expense, however, does not require the issuance of a protective order. A burden which litigants in our society must bear is that sometimes the public may learn of information which the litigant would rather the public not know.[112]

Mere embarrassment, while uncomfortable is insufficient to bar the media and public from information from the courts. The relative values are those of the public's right to know of risks coming from the marketplace as well as opportunities to avail themselves of remedies when those risks have been realized. There also remains the continuing interest on the parts of the public and government to allow for public oversight of the functions of the judicial branch of government.

In *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986), the court dealt with the threshold for finding sufficient embarrassment to justify a protective order. *Cipollone* dealt with products liability suits by smokers against tobacco companies. "The defendants assert that although the material they have turned over does not contain trade secrets, it does include materials, the dissemination of which would cause them annoyance and embarrassment sufficient to justify a broad protective order."[113] The court then enunciated the test by which the request for secrecy should be judged.

> [B]ecause release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious [. . .] a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.[114]

In *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3rd Cir. 1988), the court rejected a claim that BIC documents should be protected based on reputation.[115] "The injury BIC describes is an adverse effect on its disposable lighter sales by competitive use of the information and a potential loss in its capital stock value."[116] The court's rejection turned on its analysis of *Publicker Industries v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984).[117]

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[111] Ericson v. Ford Motor Co., 107 F.R.D. 92, 94 (E.D. Ark. 1986).

[112] Ericson v. Ford Motor Co., 107 F.R.D. 92, 94 (E.D. Ark. 1986).

[113] Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir. 1986).

[114] Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir. 1986).

[115] This case involved a claim for damages resulting from the explosion of a light manufactured by the defendant BIC.

[116] Littlejohn v. BIC Corp., 851 F.2d 673, 685 (3rd Cir. 1988).

[117] Publicker dealt with a suit arising from a proxy fight for control of Publicker Industries.

> The presumption of openness plus the policy interest in protecting unsuspecting people from Publicker in light of its bad business practices are not overcome by the proprietary interest of present stockholders in not losing stock value or the interests of upper-level management in escaping embarrassment.[118]

The cases lead to the conclusion that while embarrassment and annoyance are valid justifications for secrecy, they are likely candidates for abuse by those seeking to avoid the light of day.

Protectible Material

The third area of concern the Texas Association of Defense Counsel presented to the advisory committee working on the new Texas Rule 76a was that involving matters traditionally kept from the public eye. "For example, the area of trade secrets is an area of much concern involving the formulation of this new rule."[119] The association cited Texas cases providing protection for trade secrets, specifically, *Hyde Corp. v. Huffheinz*, 314 S.W.2d 763 (Tex. 1958) and *Automatic Drilling Machines, Inc. v. Miller*, 515 S.W.2d 256 (Tex. 1974) and *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987).

> A rule precluding sealing of appropriate documents in trade secret litigation could well eliminate the possibility of any party successfully suing to protect the property rights if the owner of the trade secret knows that the very act of suing would risk public disclosure of the matter sought to be protected.[120]

The Texas Supreme Court held in *Hyde Corporation* that. "[t]rade secrets as distinguished from patents are subject to protection under the equitable jurisdiction of the state courts."[121] Those arguing for extension of secrecy also point to the Texas case of *Automatic Drilling Machines, Inc. v. Miller*, 515 S.W.2d 256 (Tex. 1974), which precludes trade secrets and confidential information from automatic "privilege" exemption from discovery. "If the information is material and necessary to the litigation and unavailable from any other source, a witness may be required to make disclosure."[122] Here then the argument goes, the court must mix the possible disclosure in discovery with its duty to protect trade secrets and thus keep discovery materials secret. The issue of discovery will be covered in a later section, but in the context of general access, the question can be dealt with on a practical basis.

Courts have, as noted above, concluded that trade secrets are quite legitimately protectible. However, practice in sealing court records has resulted in blanket secrecy and often in cases in which the "trade secret" information was quite obviously not within the category. The federal courts have enunciated a test for trade secrets. In *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), the court concluded that a cigarette maker's desire for secrecy was not sufficient in itself to mandate secrecy.

> [C]ommon sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know. In such cases, a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.[123]

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[118] *Ibid*. Quoting *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1074 (3rd Cir. 1984).

[119] November 17, 1989, letter from J. Gordon McHaney of the law firm of Lea & Chamberlain to Charles Herring Jr., co-chairman of Texas Supreme Court Ad Hoc Subcommittee on Sealing of Court Records of the Texas Supreme Court Advisory Committee.

[120] November 17, 1989, letter from J. Gordon McHaney of the law firm of Lea & Chamberlain to Charles Herring Jr., co-chairman of Texas Supreme Court Ad Hoc Subcommittee on Sealing of Court Records of the Texas Supreme Court Advisory Committee.

[121] *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 770 (Tex. 1958).

[122] *Automatic Drilling Machines, Inc. v. Miller*, 515 S.W.2d 256, 259 (Tex. 1974)

[123] *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983).

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In *Brown*, the cigarette maker sought to seal FTC records pertaining to a change in the agency's tests for tar and nicotine contents of cigarettes. The court concluded, simply, "this is no trade secret issue."

Indeed, the trade secret talisman has repeatedly been invoked in cases which bear little relation to the original purpose of the trade secret protection. *Joy v. North*, 692 F.2d 880 (3rd Cir. 1982), involved a shareholder derivative suit brought against a bank over a series of loans, including unsecured loans, totalling more than $3.5 millon that were made to a developer. The bank employed a special litigation committee that rejected a shareholder's demand. Suit was brought, the district court dismissed after placing the litigation committee's report under protective order. The rationale put forth in obtaining the protective order for the litigation report,

> was merely that it and the accompanying documents were protected by the attorney-client privilege and the work-product immunity and involved a candid assessment of the bank's internal operations, which, if made public, would adversely affect the two corporations in the banking industry and the Bridgeport community. This showing is patently inadequate. [. . .]The Report is no longer a private document. It is part of a court record. Since it is the basis for adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny. The potential harm asserted by the corporate defendants is in disclosure of poor management in the past. That is hardly a trade secret. The argument that disclosure of poor management is so harmful as to justify keeping the Report under seal proves too much since it is a claim which grows stronger with the degree of misconduct. Were outright looting of Citytrust disclosed by the Report, for example, the harm of publication would be even greater.[124]

The court in *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1983) adopted a balanced approach in the protection of trade secrets and the accommodation of media access in court proceedings. That case involved the exclusion of the media from a contempt hearing based on the finding that trade secrets would be revealed. The presiding judge excluded the media from the contempt hearing but later provided access to 587 of the 649 pages of the hearing transcript. Interestingly enough, the contempt hearing focused on the allegations of violation of a protective order. The contempt hearing was brought on allegations that a plaintiffs' lawyer involved in a toxic-shock suit against Procter & Gamble had sold certain documents to more than 30 other attorneys involved in toxic-shock cases.

The court noted the peculiar characteristics of trade secrets that made them so fragile. "Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed."[125] The court therefore acknowledged that some exclusion might be necessary so as to protect the nature of trade secrets and so allowed *in camera* consideration, with limitations. "We will insist, in future cases, that the *in camera* consideration be as limited as possible."[126]

In its review of the district court's action in excluding the media from the contempt hearing, the Eighth Circuit indicated the procedures district courts should take in such circumstances. The court found precedential support for the proposition that contempt hearings are subject to a right of public access.[127]

> Arguably, the public interest in securing the integrity of the fact-finding process is greater in the criminal context than the civil context, since the condemnation of the state is involved in the former but not in the latter, but it is nonetheless true that the public has a great interest in the fairness of civil proceedings. Hence we conclude that the protection of the First Amendment extends to proceedings for contempt, a hybrid containing both civil and criminal

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[124] *Joy v. North*, 692 F.2d 880, 894 (1982).

[125] *In re Iowa Freedom of Information Council*, 724 F.2d 658, 662 (8th Cir. 1983).

[126] *Ibid*. At p. 662.

[127] The court applied the reasoning from *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

characteristics.[128]

Among the First Amendment protections that the court found necessary were the opportunity, when objection to closure was made, to allow the objecting parties to state those objections. The court also laid down rules on determining whether trade secrets were involved. "In such an important matter, courts should not simply take representations of interested counsel on faith."[129] The court declared that such issues were matters of fact, "to be decided after receiving evidence."

A generally accepted definition of trade secret to be applied to such determinations by the courts is found in Restatement of Torts Section 757 comment b (1939) as quoted in *United States v. International Business Machines Corp.*, 67 F.R.D. 40, 46 n.9 (S.D.N.Y. 1975).

> A formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

The adherents of secrecy got what appeared to be, compelling support for their position with the release of a study of the federal judiciary in April. "Report of the Federal Courts Study Committee," product of a Congressionally created panel consisting "of diverse membership appointed by the Chief Justice," made reference to protective orders for sensitive materials. "Federal courts should continue to use protective orders to preserve the confidentiality of sensitive materials in order to expedite discovery. That such materials are disclosed through discovery does not make them presumptively public."[130] However, the committee went on to say that sharing discovery would be equally valid in situations involving multiple, similar cases. "[W]hen the same issues arise in several related cases, sharing of information can make litigation more accurate and less expensive by avoiding duplication of effort."[131]

In addition to trade secrets, the Texas defense lawyers association also referred to family law matters such as adoption and child custody in its oppostion to the Texas Rule 76a. The subjects of adoption and child custody may well be foreclosed by legislative action as noted by Justice Hecht of the Texas Supreme Court. "The Legislature makes certain court records secret, when they involve minors, for example, sometimes when they involve incompetents they are secret by statute."[132] But even here, questions about the fairness of proceedings and the public interests in seeing that the interests of minors are protected may well require some access that both guarantees the protection of the identities of the minors while placing the procedures and decision-making rationales in the light of day. The new Texas rule excludes documents "filed in an action originally arising under the Family Code" and exempt by statute, thus ensuring protection for those traditionally private areas.

Discovery Among a Plethora of Plaintiffs

Another cited concern expressed by the Texas defense bar is the use of unsealed discovery material. Discovery material, if disseminated by the media would tip off other, similarly situated plaintiffs who had suits against a common defendant. Rose Murphy, associate counsel of the Land and Timber Group of International Paper, also sent a letter to the advisory committee urging it "to maintain, if not strengthen, the use of protective orders and settlement agreements as procedural tools."

The plaintiff's bar is lobbying for the elimination of the use of protective orders and sealed

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[128] In re Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983).

[129] Ibid. At p. 663.

[130] Report of the Federal Courts Study Committee," p. 102.

[131] Ibid.

[132] Interview with Justice Hecht March 1990.

> settlement agreements. The reason for their position is quite apparent. Through open-ended access to information, plaintiff's attorneys and others could aggressively market and exchange sensitive or confidential information for monetary or other gain. This would result in a perversion of the legal system and the discovery rules. In our opinion, the Texas Supreme Court should not condone such use.[133]

Francis Hare, an Alabama attorney, presented the clear defense argument for restricting the dissemination of discovery and other materials in the Ninth Annual Southern Methodist University School of Law's Personal Injury and Products Liability Symposium conducted in February of 1988 in Lake Buena Vista, Florida. Hare noted that defense counsel in design defect litigation or drug cases typically involve collaborative efforts by the local defense attorney and corporate defense counsel. Hare maintains that such arrangements are necessary as, "[i]t would be difficult for local defense counsel to adequately prepare a complete products case without such assistance." But it is routine practice, as noted above, for the defense counsel to obtain a protective order to prevent plaintiffs' counsel from sharing discovery materials. And that, Hare, contends places the plaintiffs' counsel at disadvantage.

> (1) By isolating each plaintiffs' counsel it denies them the benefits of collaborative effort. Thus guaranteeing them advantage to local defense counsel who retain access to their cooperative mechanism.[134] (2) It increases the time and costs of discovery (not only is duplicative discovery required but for fear of a vital omission, each plaintiffs' counsel is forced to conduct more aggressive discovery in his individual case). (3) It compromises the efficiency of the discovery process (such orders not only limit the access to relevant and discoverable information, they inevitably lead to uneven and inconsistent responses from the defendant. (4) It injects collateral issues totally unrelated to the merits of the case (e.g., retrials on the merits when vital documents first surface after trial, hearings on sanctions, striking the testimony of experts whose opinions are based on "protected" documents) concerning the obedience to the order.[135] (5) It raises (if not insures) the specter of unequal and unjust results in the individual cases.[136]

The Congressional Research Service of the Library of Congress touched on the question of shared discovery in a manner which implicates a benefit from media access and dissemination in a 1989 study on civil case confidentiality and secrecy. "[E]xisting litigants who are similarly situated may require the protected information for their own case, either to confirm defendant's information with previously obtained materials, save the expense of obtaining the documents themselves, or use it for purposes of collateral estoppel."[137] The study noted, "The failure of defendants to turn over relevant information has been noted in a number of product liability cases."[138] Dissemination through the media would be an effective means of ensuring the widest access to such discovery materials in the shortest period of time. In *Patterson v. Ford Motor Co.*, 85 F.R.D. 152 (W.D. Texas 1980), the district court rejected an attempt by Ford to restrict the plaintiff from using discovery material "in any way except in connection with this lawsuit."

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[133] Jan. 24, 1990, letter from Rose Murphy, associate counsel for the Land & Timber Group of International Paper to Charles Herring Jr.

[134] The case of Ward v. Ford Motor Co., illustrates the differential approach taken by defense and plaintiffs' lawyers. Ward involved a gas-tank fire injury claim and was one of hundreds of such cases filed against Ford. Ford sought a protective order to prevent plaintiffs' attorney from cooperating with a plaintiffs' group. In the ruling the court noted that Ford, "has admitted that it, quite properly, coordinates its defenses in the cases filed against it throughout the United States, thus in effect providing the various attorneys defending it a service similar that the Group provides for plaintiffs' attorneys.

[135] The courts have noted the failure of defense counsel to provide discoverable materials as in Transatlantic Bulk Shipping v. Saudi Chartering, 112 F.R.D. 185 (S.D.N.Y. 1986) in which sanctions were imposed "where the defendants had produced only a small number of documents, after great delay, and in instances only after plaintiff had succeeded in showing existence of documents, despite three court orders," at 186.

Similarly, the Texas Supreme Court noted the abuses of discovery in Garcia v. Peeples, 734 S.W.2d 343 (Tex. 1987), a case that involved protective orders.

> Unfortunately, this goal of the discovery process is often frustrated by the adversarial approach to discovery. The "rules of the game" encourages the parties to hinder opponents by forcing them to utilize repetitive and expensive methods to find out the facts.
>
> The truth about relevant matters is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise. At 347.

[136] Ninth Annual Southern Methodist University School of Law's Personal Injury and Products Liability Symposium, February 24-26, 1988, Lake Buena Vista, Florida, pp. D-15,16.

> There is nothing inherently culpable about sharing information obtained through discovery. The availability of the discovery information may reduce time and money which must be expended in similar proceedings, and may allow for effective, speedy and efficient representation. [. . .] Unless it can be shown that the discovering party is exploiting the instant litigation solely to assist in a foreign forum, federal courts allow full use of the information in other forums.[139]

That conclusion was repeated in *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Georgia 1980), in which the court rejected a GM request for protective order in a suit over a fuel-fed fire. The court noted that the federal rules do not bar litigant collaboration. "[T]he court does not consider the possibility that plaintiff will share the results of discovery with any other litigant any part of defendants' showing of good cause to justify a protective order."[140]

The Texas Supreme Court agreed with the reasoning in *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987), another GM gas-tank fire products liability case. "In addition to making discovery more truthful, shared discovery makes the system itself more efficient."[141] The court criticized the procedures then in place for discovery.

> The current discovery process forces similarly situated parties to go through the same discovery time and time again, even though the issues involved are virtually identical. Benefiting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery efforts even though the opponents share similar discovery needs and will litigate similar issues. Discovery costs are no small part of the overall trial expense.[142]

Yet another reason for allowing accessibility in the context of multiple plaintiffs is the possibility that a party may deliver discoverable documents to one plaintiff but withhold such documents from another. Media access and the allowance of shared discovery would do much to foreclose such activity. The practice of denying properly discoverable material is not unknown among litigants as exemplified by *Transatlantic Bulk Shipping v. Saudi Chartering*, 112 F.R.D. 185 (S.D.N.Y. 1986), in which the district court ordered sanctions against a defendant for producing only a small number of documents, "after great delay, and in instances only after plaintiff had succeeded in showing existence of documents [. . .]."[143]

The Texas Supreme Court expressed a similar concern in *Garcia*. "Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses."[144]

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[137] Kenneth Thomas, Confidentiality and Secrecy Orders in Civil Cases, CRS Report for Congress, April 3, 1989, at p. CRS-4.

[138] Ibid. See fn. 12 at p. CRS-4.

[139] Patterson v. Ford Motor Co., 85 F.R.D. 152, 154 (W.D.Texas 1980).

[140] Parsons v. General Motors Corp., 85 F.R.D. 724, 725 (N.D. Georgia 1980).

[141] Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987).

[142] Ibid. At p. 347.

[143] Transatlantic Bulk Shipping v. Saudi Chartering, 112 F.R.D. 185, 186 (S.D.N.Y. 1986).

Settlements and Secrecy

The Texas court's consideration of the new Rule 76a on record sealing drew comments from persons expressing their reservations about the effect of making sealing more difficult on settlement of cases. One such letter came from Douglas Corderman, director of product liability for Emerson Electric Co., a major American electrical and electronic manufacturer producing such consumer products as Sears Craftsman Power Tools, Skil Tools and In-Sink-Erator garbage disposals as well as industrial products.

> Most of all we oppose expansion of the definition of "court records" because it is counterproductive to the whole idea of settlements. [. . .] Settlements ease their case loads, provide for a speedier resolution to disputes, and frequently reduce the total cost to the parties by minimizing legal expenses and avoiding excessive verdicts. One of the principle reasons parties are willing to settle is because the settlement terms remain private. If this condition were to change, companies such as Emerson would be much more reluctant to settle. Privacy and the protection of trade secrets are worth something. If we do not get these in a settlement, settlement is much less attractive.[145]

The defense lawyers association, which also expressed opposition to making sealing more difficult, contended that the interest of judicial efficiency in coping with the enormous number of civil cases in the court system. "Settlement considerations are even more important today with the overwhelming dockets of some of our courts."[146]
The Association cited *Fernandez v. Telles*, 663 S.W.2d 91 (Tex.App. - El Paso 1983, no writ) and *Bass v. Phoenix Seadrill/78 Ltd.*, 749 F.2d 1154 (5th Cir. 1985). *Fernandez* centered on a dispute over the purchase of a mechanical bucking bull. The parties to the suit originally entered into a contract to sell the bull but, after the bull reportedly suffered a series of breakdowns, rescinded the contract in a compromise settlement. Later, the buyers, brought suit under the terms of the Texas Deceptive Trade Practices Act. That suit resulted in a take nothing judgment against the buyers. In what appears to be the defense bar's strong point, the court said, "[t]he law has always favored the resolution of controversies through compromise and settlement rather than through litigation and it has always been the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy."[147] However, even a cursory examination of the language points to the issue as one of a contract superseded by another and the court's endorsement of the second agreement and not a broad shield to uphold settlement to the detriment of public awareness of hazards.

Bass involved a district court's voiding of parts of a settlement of a lawsuit brought by a seaman injured on a drilling rig. The Fifth Circuit set aside the portions of the district court's judgment voiding the portions of the settlement. However, the case does little to advance the cause for secrecy from public awareness except to note that settlements are favored. "We certainly agree with the district court's initial premise: public policy favors voluntary settlements which obviate the need for expensive and time consuming litigation."[148]

The *Washington Post*, in a four-part series called "Public Courts, Private Justice," reported on the use of secrecy agreements to facilitate settlements. In one case filed in 1982, several dentists sued the Chesapeake & Potomac Telephone Co. over the phone company's mistake in a telephone number in the D.C. Yellow Pages. At

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[144] Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987).

[145] Jan. 19, 1990 letter from Douglas Corderman, director of products liability for Emerson Electric Co. to Charles Herring, Jr., co-chairman of the Texas Supreme Court Advisory Committee.

[146] November 17, 1989, letter from J. Gordon McHaney of the law firm of Lea & Chamberlain to Charles Herring Jr., co-chairman of Texas Supreme Court Ad Hoc Subcommittee on Sealing of Court Records of the Texas Supreme Court Advisory Committee.

[147] Hernandez v. Telles, 663 S.W.2d 91 (Tex.App. 8 Dist. 1983).

[148] Bass v. Phoenix Seadrill/78 Ltd., 749 F.2d 1154, 1164 (5th Cir. 1985).

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first, the phone company refused to make the correction. Then D.C. Superior Court Judge David Norman halted the distribution of the books.

> The case was settled when C&P agreed to correct the phone number - which it called an unprecedented move and not legally required - as long as Norman agreed to seal the case.
>
> C&P did not want other advertisers to know such a remedy was available, Ken Pitt, a C&P spokesman, said. "If every time we had a complaint we had to stop the presses, it would be an impossible situation," Pitt said. "We would never get the books out."[149]

A number of cases cited by James Goodale in his *Communications Law 1989*, present a trend toward openness in settlement agreements in both federal and state courts. The Third Circuit used a common-law right of access rationale to reverse the sealing of a settlement agreement of a suit between a bank and developer. The court specifically excluded First Amendment consideration in its decision. In *Bank of America*, the parties to the suit argued "that the settlement agreement is a nonpublic aspect of litigation that 'may properly be sealed from strangers to the agreement.'"[150] They cited to the Supreme Court's decision in *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984) in which the high court upheld the right of a court to enter a protective order for material produced in the discovery process.

> [U]nlike the civil discovery materials at issue in *Seattle Times*, a motion or a settlement agreement filed with the court is a public component of a civil trial. As in the cases involving trial rulings or evidence admitted, the court's approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate.[151]

The court repeated the Supreme Court's decision that a presumption exists for access to judicial records and judicial documents.[152] The court noted though that the right of access was not absolute. The court made a distinction based on access under the First Amendment or under common-law access. For an attempt to seal records under the common-law, "[t]he burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption."[153] To overcome a First Amendment presumption of access, the party had to show "an overriding interest based on findings that closure is narrowly tailored to serve that interest."[154]

The majority in *Bank of America* addressed and rejected the advocacy of secrecy in settlement agreements to facilitate settling of cases and relieve court case loads.

> In the name of encouraging settlements, Judge Garth would have us countenance what essentially are secret judicial proceedings. We cannot permit the expediency of the moment to overturn centuries of tradition of open access to court documents and orders.[155]

In the majority view, the value of public access was such that it should be continued. The court cited "informed discussion of governmental affairs by providing the public with more complete understanding of the judicial system," as well as providing for a "public perception of fairness which can be achieved only by permitting full public view of the proceedings."[156] Finally, the court declared, "[d]isclosure of settlement documents serves as a check on the integrity of the judicial process. [. . .] Although FAB III does not allege any impropriety, as a general proposition access assures "that the courts are fairly run and judges are honest."[157]

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[149] "Hundreds of Cases Shrouded in Secrecy" "Area Suits Often Sealed With Few Queries," Washington Post series "Public Courts, Private Justice."

[150] Bank of America National Trust v. Hotel Rittenhouse, 800 F.2d 339 (3rd Cir. 1986).

[151] Ibid. At pp. 333-334.

[152] Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[153] Bank of America National Trust v. Hotel Rittenhouse, 800 F.2d 339, 344 (3rd Cir. 1986).

[154] Ibid. Quoting from Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1073 (3rd Cir. 1984).

[155] Ibid. At p. 345.

In his dissent, Judge Leonard Garth addressed the concerns expressed by those opposing access to court records. Garth especially noted the importance of secrecy in parties' agreements to settle and thus reduce the caseload of the courts. He pointed to compelling reasons for parties to require sealing of settlements. They fall into three categories: (1) disclosure of trade secrets or information that invades the privacy of parties, (2) immunity from discovery by subsequent plaintiffs and prevention of admission of such discovered material and (3) effects of disclosure of terms of settlements, especially amounts of settlement. "Many defendants would almost certainly proceed to trial rather than broadcast to all potential plaintiffs how much they might be willing to pay."[158]

Judge Garth pointed to the savings resulting from settlement and the obverse, the increased burden of eliminating settlement, particularly in cases of mass torts involving many plaintiffs. "Such cases are characteristically long, complex, and costly to try, and the savings in public and private resources achieved by settling them are immense."[159]

Perhaps the strongest arguments to be brought forward in favor of secrecy for settlements come from the cases of *Palmieri v. State of N.Y.*, 779 F.2d 861 (2nd Cir. 1985); and *Cincinnati Post v. General Electric*, 109 S. Ct. 1171; 103 L. Ed. 229 (1989), which affirmed, without comment, the decision in *Cincinnati Gas and Electric Co. v. General Electric Co.*, 854 F.2d 900 (6th Cir. 1988). *Palmieri* involved an attempt by New York state officials to unseal a settlement in an antitrust action to allow grand jury scrutiny of the facts. The Second Circuit ruled that a combination of the parties' reliance on the sealing order for purposes of settling the action and the inability of the state to show that the sealing order was granted improvidently in rejecting the attempt to open the settlement.

> Although "secrecy of settlement terms . . . is a well-established American litigation practice," [. . .] and although the extent to which judicial records ought to be subject to public access may often be a question "best left to the sound discretion of the trial court," [. . .] no amount of official encouragement and reliance thereon could substantiate an unquestioning adherence to an order improvidently granted.[160]

The court enunciated the test for such improvident grant as "whether the issuing official - here the magistrate - reasonably should have recognized a substantial likelihood that the settlement would facilitate or further criminal activity.[161]

The language referring to the "well-established American litigation practice" of secret settlement comes from *In re Franklin National Bank Securities Litigation*, 92 F.R.D. 468 (E.D.N.Y. 1981). The court there refused to unseal terms of settlement in multidistrict litigation relating to banking insolvency. That court weighed the competing interests of the parties and the court in resolving the issue.

> Had the trial continued, many millions of dollars more would have been expended in legal fees, a trial part would have been heavily engaged for a long period, more appeals were inevitable and jurors would have been inconvenienced.

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[156] Ibid. At p. 345.

[157] Ibid. Citing Smith II, 787 F.2d 111, 114 (3rd Cir. 1986); Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985); and quoting Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980).

[158] Ibid. At p. 352.

[159] Ibid. At p. 352.

[160] Palmieri v. State of N.Y., 779 F.2d 861, 865 (2nd Cir. 1985).

[161] Ibid. At pp. 865-866.

> As a result of intensive negotiation the case was settled just as the trial got underway. This result could not have been achieved without an agreement that the amounts paid would not be revealed. Secrecy was deemed vital by one of the parties because unrelated legal disputes might have been affected had the settlement pattern in the *Franklin* case become public knowledge.[162]

The court found a right of intervention for the consumer organization seeking information about the settlement but found the public interest in information outweighed by resolution of the issues without litigation.

In *Cincinnati Post*, the court rejected an attempt to prevent closure of a summary jury trial in a suit over construction of a nuclear power plant. In its decision, the court concluded that the summary jury trial was not a procedure open to the public. Quoting the district court, the Sixth Circuit said, "[t]he summary jury trial, for all it may appear like a trial, is a settlement technique."[163] The court's only reference to settlements themselves is the *Palmieri* passage about the American litigation practice of "secrecy of settlement terms."

Therefore, the Supreme Court's denial of writ of certiorari without comment is not dispositive of the issue of sealing of settlements as the dispute centers on a settlement process, a settlement negotiation. "As the lower court correctly noted, the public would have no entitlement to observe any negotiations leading to a traditional settlement of the case [. . .]."[164]

At the state level, the cases point to a presumption of access. In *C.L. v. Edson*, 409 N.W.2d 417 (Wis.App. 1987), the appellate court addressed the question of the sealing of a settlement involving claims of sexual and psychological abuse of patients by health care providers. The settlement agreement included the stipulation that sealing was to "protect the interests of" and "to avoid further psychological trauma" to the plaintiffs.[165] The court noted the Wisconsin Supreme Court's holding favoring the presumption that court records are open to access. The it outlined the balancing test under which a challenge to that openness must be met. "In order to overcome the presumption favoring disclosure, under the *Hathaway*[166] test, the original parties must show that public interest favoring secrecy outweigh those favoring disclosure."[167]

The court addressed claims by the original parties that access would adversely affect the privacy of the minor plaintiffs and the health care providers, psychologically harm the original plaintiffs and the disposition toward settlement. With regard to scrutiny of settlements involving minors, the court noted the existence of a statute requiring judicial scrutiny of such agreements. "This mandate is better served when the public can monitor judicial supervision of minor settlements."[168] The court also recognized that the health care providers were part of a highly regulated professional community. "Such regulation shows the public's interest in scrutinizing alleged wrongdoing among members of the psychiatric profession. These considerations outweigh the parties' objections to disclosure on the grounds that they are not public figures."[169] The court acknowledged the existence of potential harm to the original plaintiffs but found no factual basis for such actual harm.

The court then took up the question of the impact of openness on settlement, giving short shrift to the arguments for secrecy. The original parties argued, as have those opposing public disclosure, that making the

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[162] *In re Franklin National Bank Securities Litigation*, 92 F.R.D. 468 (E.D.N.Y. 1981).

[163] *Cincinnati Gas and Electric Co. v. General Electric Co.*, 854 F.2d 900, 902 (6th Cir. 1988).

[164] *Ibid*. At p. 905.

[165] *C.L. v. Edson*, 409 N.W.2d 417 (Wis.App. 1987).

[166] *Hathaway v. Joint School District No. 1*, 342 N.W.2d 682 (Wis. 1984). In this action to compel disclosure of the names and addresses of pupils enrolled in the school district, the Wisconsin Supreme Court held that a general presumption of public access to public records except for express statutory exemption or an overriding public interest in keeping the public record confidential. At pp. 686-687. Citing an earlier case, the court said, "We did recognize in *Youmans* that public policy favors the right of inspection and it is only in the *exceptional* case that inspection should be denied." At p. 686.

[167] *C.L. v. Edson*, 409 N.W.2d 417, 422 (Wis.App. 1987).

[168] *Ibid*. At p. 422.

[169] *Ibid*. At p. 422.

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agreements public would chill future litigants and run counter to the public's interest in encouraging settlement. "These arguments are speculative. [. . .] The parties have failed to show that the public's interest in encouraging settlements overcomes the strong presumption favoring disclosure of court documents," the court declared. In addition, the court noted that the trial court offered a means to protect the parties through editing of the agreement.

The Virginia Supreme Court noted the reasoning in *C.L. v. Edson*, which rejected the claim that scrutiny of settlement would chill the process and discourage settling of cases, in *Shenandoah Publishing House, Inc. v. Fanning*, 368 S.E.2d 253 (Va. 1988). There the court rejected the sealing of settlement records in a wrongful death case.

> The public has a societal interest in learning whether compromise settlements are equitable and whether courts are administering properly the powers conferred on them. Moreover, the people have a vital interest, one of personal and familial as well as community concern, in cases involving claims of medical malpractice on the part of licensed practitioners and other health care providers.[170]

The Texas Rule 76a addressed a major concern of the defense bar and business community with its exclusion of the amount of settlement from disclosure. It is clear that a similar approach in other cases through appropriate editing for publication would do much to settle that matter. Apart from that, an analysis of the comments advanced lead to a conclusion that defendants and the defense bar are willing to play Peck's Bad Boy[171] in the area of settlement unless given the secrecy their prize. That, in turn, creates a self-fulfilling prophecy about the harmful effects on judicial efficiency without secrecy. Such an approach is compelling from a strict judicial efficiency point of view. However, strict efficiency is not the be all and end all of the justice system.

Access in Discovery

The new Texas Rule 76a signifies a major departure from the philosophy that discovery material should not be made available to the public, and or media. Those arguing for secrecy pointed to the coercive nature of the discovery process and the resultant vulnerability of parties when materials obtained through the discovery process would become matters of public comment. The Texas court declared a public interest right in the definition of court records carrying a presumptive right of openness to the public is,
"discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights."[172]

For discovery in general, the U.S. Supreme Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1983), rejected restrictions on the discretion of trial courts to regulate access to information revealed in the course of discovery. *Seattle Times* involved discovery materials obtained in the course of a defamation suit brought by the leader of a religious group. The defendant Seattle Times sought the identities of the group's members and donors. The trial court issued a protective order in response to claims that public release of the identities in question would result in harassment and reprisals against those identified and reduce the group's membership.

The cases centered on Federal Rule of Civil Procedure 26(c) and in a footnote, the court quoted the text of the rule.

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which

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[170] Shenandoah Publishing House, Inc. v. Fanning, 368 S.E.2d 253, 256 (Va. 1988).

[171] Peck's Bad Boy is a reference to the title character of a play from the early American theater which featured the exploits of a juvenile whose chief claim to fame was his willingness to misbehave in order to achieve his goals.

[172] Texas Rule of Civil Procedure 76a(2)(c).

> justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: [. . .] (6) that a deposition after being sealed be opened only be order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way [. . .][173]

The court further noted that Rule 26(c) typifies discovery rules of many states.[174]

The court in *Seattle Times* held that the protective order "does not offend the First Amendment." However, the holding distinguished the facts of this particular case from an iron-clad rule against a First Amendment claim in general.

> Judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in other contexts. Rules authorizing discovery are a matter of grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. Furthermore, restraints placed on discovered information are not a restriction on a traditionally public source of information.[175]

The court here acknowledged the unique nature of the information gathered through discovery. Matters that normally would not be disclosed by a person, group or institution are revealed under rules promulgated and enforced by the state in the context of litigation. Therefore, the state has the ability to decide the manner and even whether the information is disseminated. The First Amendment does not provide a guarantee of access to such information.

> It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
>
> There is an opportunity, therefore, for litigants to obtain - incidentally or purposefully - information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.[176]

For this reason, the court concluded that where, as required by Fed.R.Civ.Pro. 26(c), good cause was shown for a protective order, "it does not offend the First Amendment."

If the analysis stopped here, it would have been easy to justify the presumption of no media access to discovery information. However, as discretion lies with the state in determining the disposition of discovery material, the First Amendment can be among the valid and weighty considerations used to determine whether to allow access. In other words, that which is not mandated is neither automatically excluded. The court in *Seattle Times* acknowledged a First Amendment component and differentiated between limitations on dissemination of discovery information and the "classic prior restraint that requires exacting First Amendment scrutiny."

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[173] *Ibid*, at p. 26.

[174] Jack Friedenthal, Mary Kane and Arthur Miller note in their hornbook, *Civil Procedure*, 1985, that the federal rules of discovery have been widely adopted. "Of all the Federal Rules, they have been the most widely copied; nearly every state has adopted a similar set of provisions permitting broad, intensive discovery." At p. 380.

[175] *Ibid*.

[176] *Ibid*. at p. 35.

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> In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context. Therefore, our consideration of the provision for protective orders contained in the Washington Civil Rules takes into account the unique position that such orders occupy in relation to the First Amendment.[177]

Such First Amendment consideration has not since arisen in the Supreme Court, but federal courts of appeal and state appellate courts have dealt with the issue.

Less than two years after *Seattle Times* was announced, the Third Circuit addressed the issue in *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986). *Cipollone* was a products liability suit by cigarette smokers or their personal representatives against tobacco companies. The Third Circuit addressed the question of whether a discovering party could publicly disclose materials that the producing party claimed was confidential.

The Third Circuit held that *Seattle Times* ruled out First Amendment consideration in evaluating protective orders relating to discovery. Citing an earlier Third Circuit case, *State of New York v. United States Metal Refining Co.*, 771 F.2d 796 (3rd Cir. 1985), the court said it "found there that *Seattle Times* confirmed our previous suspicion that protective orders in civil discovery did not require first amendment analysis."[178] *Cipollone* also stands for the position in *Seattle Times* that, as discovery is not a traditionally public forum and is a product of legislative grace, there is no First Amendment consideration. For that reason, courts need not choose a "least restrictive" approach to prevent the harms envisioned in Fed.R.Civ.Pro. 26(c).

But, later in 1986, the First Circuit reached a strongly different result in *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986). The case involved a suit over the allegation that Cryovac, Inc. had contaminated the Woburn, Mass., water supply. The Globe Newspaper Company intervened in the action to attack a protective order forbidding dissemination of information obtained through discovery.

The First Circuit noted that "*Seattle Times* has foreclosed any claim of an absolute public right of access to discovery materials." But unlike the Third Circuit's analysis in *Cipollone*[179], the First Circuit found a First Amendment component to the issue of protective orders. The First Circuit focused on the Supreme Court's explanation that if good cause is shown, the restriction is limited to discovery and the protective order does not restrict the use of the same information found through different sources, then the action does not offend the First Amendment.

> In our opinion, this means that first amendment considerations cannot be ignored in reviewing discovery protective orders. Although the "strict and heightened" scrutiny tests no longer apply, the first amendment is still a presence in the review process. Protective discovery orders are subject to first amendment scrutiny, but that scrutiny must be made within the framework of Rule 26(c)'s requirement of good cause.[180]

Although it disapproved of the trial court's protective orders because of their selective exclusion of the news media from information otherwise publicly disseminated, the First Circuit found adequate the trial court's "good cause" for issuing the orders. The First Circuit, using the reasoning from *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), determined that discovery was distinct from those aspects of court proceedings that call for public access. The court repeated the language of *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

> Even though the draftsmen of the Constitution could not anticipate the 20th-century pretrial proceedings to suppress evidence, pretrial proceedings were not wholly unknown in that day.

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[177] Ibid. at 34.

[178] Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3rd Cir. 1986), at p. 1118.

[179] Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3rd Cir. 1986).

[180] Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986) at p. 7.

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> Written interrogatories were used pretrial in 18th-century litigation, especially in admiralty cases. . . . Yet, no one ever suggested that there was any "right" of the public to be present at such pretrial proceedings as were available in that time; until the trial it could not be known whether and to what extent the pretrial evidence would be offered or received.
>
> Similarly, during the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants.[181]

And yet, in Justice Powell's concurrence in *Gannett*, such pretrial procedures can be of vital importance in litigation. Powell wrote in a footnote to his concurrence.

> In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling may determine the outcome of the case. Indeed, in this case there was no trial as, following the suppression hearing, plea bargaining occurred that resulted in guilty pleas.[182]

The suppression hearing is much like the discovery process in that the nature of the material discovered often determines the outcome of cases. Where a party obtains such damaging information as the GM analysis placing a $200,000 value on each person killed in a fuel-fed fire or a Pfizer internal report on allegedly defective heart valves sold to an unsuspecting public, the case may settle so that the damaging documents do not come out in open court.

The First Circuit concluded that requiring access to discovery materials might well make the civil discovery process more difficult. The court noted the wide latitude in discovery as well as the public interest of efficiency in resolution of the issues of a lawsuit.

> But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this could in turn lead to lengthy and expensive interlocutory appeals, just as it did in this case.[183]

At the end of 1987, the United States District Court for the District of Columbia also faced the issue of access to discovery materials and a balancing of First Amendment and governmental interests. The issue in *Avirgan v. Hull*, 118 F.R.D. 252 (D.D.C. 1987), centered around press and public attendance at a deposition. The District Court, Judge Joyce Hens Green, employing the holding of *Seattle Times* and *Anderson*, examined Fed.R.Civ.Pro. 26(c) and concluded the issue did not center on First Amendment concerns, but rather rested on whether the party seeking the blanket protective order had shown good cause.

In Judge Green's court, parties seeking protective orders carried the burden of proving the necessity of the order. In that particular court, the burden required that the moving party show "clearly defined and serious injury" that would result. In *Avirgan*, the claim that the media attention would harm his reputation and privacy. Judge Green found the case akin to that of *Koster v. Chase Manhattan Bank*, 93 F.R.D 471 (S.D.N.Y. 1982). In that case, defendants sought a protective order to prevent press disclosure of discovery material. The case involved claims that a bank officer had forced the plaintiff into a sexual relationship and had harmed her in other ways. The plaintiff had publicized the case and both the bank and the officer, who had since left the bank, reported they had suffered injuries which would be repeated if access were not denied. But the court rejected the motion for the protective order saying, "[t]he goal of prohibiting disclosure of information that will embarrass or otherwise injure the defendants could be achieved using less drastic alternatives, without "shutting the barn door after the horses had left."[184]

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[181] Gannett Co. v. DePasquale, 443 U.S. 368, (1979), at 396. Concurrence of Chief Justice Burger.

[182] Gannett Co. v. DePasquale, 443 U.S. 368 (1979), at p. 397.

[183] Anderson v. Cryovac, 805 F.2d 1 (1986), at p. 12.

The U.S. Supreme Court noted in *Seattle Times* that most states employ discovery rules similar to Rule 26 and Jack Friedenthal, Mary Kane and Arthur Miller note in their hornbook, *Civil Procedure*, 1985, that the federal rules of discovery have been widely adopted. "Of all the Federal Rules, they have been the most widely copied; nearly every state has adopted a similar set of provisions permitting broad, intensive discovery." At p. 380.

Another Harm to Defendants

A claim for parties seeking to keep the process of litigation secret which was not addressed in the Texas defense bar's objections to the new Texas Rule of Civil Procedure 76a is that of the potential for prejudicing future juries against a party. The argument, which was developed in *Hutchinson v. Luddy*, 16 Media L. Rep. 1001 (Pa. Ct. Common Pleas 1989), was that allowing public disclosure of facts in a case would prejudice a defendant's right to a fair trial later on. In *Hutchinson*, a Catholic priest faced both civil action and a criminal complaint in connection with allegations that he engaged in unlawful sexual acts with a minor. The priest and his codefendants, including the diocese and its bishop, sought a protective order relating to pretrial matters in the civil case.

> The brief [. . .] asserts that sealing is necessary in this case to prevent irreparable harm and prejudice to defendants, that public access to pretrial proceedings will have the effect of convicting defendants without trial, that sealing is necessary to assure defendants a fair and impartial trial [...][185]

However, the Pennsylvania Court of Common Pleas rejected a blanket request for closure of all proceedings citing the tests in *Publicker v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984), and *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates*, 800 F.2d 339 (3rd Cir. 1986). The *Publicker* test required that the party seeking closure demonstrate an important government interest and a lack of a less restrictive way to serve the interest. It further required a showing that the material sought to be protected falls within the category that courts are willing to protect and that "good cause" to deny access exists. "'Good cause' is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure."[186]

The *Bank of America* test required a showing of "an overriding interest based on findings that closure is narrowly tailored to serve that {First Amendment test in *Publicker*} interest."[187]

The Pennsylvania court then ruled that the civil defendants had not made a showing of "good cause" needed to force closure.

> [W]e cannot find at this point in this civil case, that defendants have demonstrated that their interest in preserving reputation outweighs the public interest in open judicial proceedings {. . .}
>
> We also cannot find, at least at this stage of the case, that defendants have shown that their right to fair and impartial civil jury trial has been prejudiced.[188]

The court noted, however, that subsequent publicity might warrant reconsideration of the claim regarding right to fair trial. The court also rejected an outright blanket closure of the proceedings regarding the criminal defendant but took steps within the Pennsylvania Rules Of Professional Conduct to ensure that counsel would not act in a manner that endangered the defendant's right to a fair trial.

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[184] Koster v. Chase Manhattan Bank, 93 F.R.D. 471 (S.D.N.Y. 1982), at 481.

[185] Hutchinson v. Luddy, 16 Media L. Rep. 1001, at 1003.

[186] Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3rd. Cir. 1984), at 1071.

[187] Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates, 800 F.2d 339 (3rd. Cir. 1986), at 344.

[188] Hutchinson v. Luddy, 16 Med. L. Rptr. 1001 (1989), at 1007.

Taken to its extreme, this claim by the defense bar would require that no disclosure of any civil suit be allowed for fear of prejudicing a party's right in any later possible suit. As the Pennsylvania court decided, that concern is too remote for consideration in all but the most compelling situations.

Right to Intervene

A major concern for the opposing sides and the courts where access is decided is the question of intervention by a nonparty. The Texas Rule 76a makes intervention a matter of right by party and nonparty. It, in fact, appears to invite nonparty participation by requiring the movant to post notice in places where notice for public meetings are posted and to briefly state the nature of the case and records sought to be sealed.

On the federal level, in *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), the court followed the reasoning of the Fifth Circuit in holding that nonparties should employ Fed.R.Civ.Pro. 24 to determine intervention in a case. *In re Beef Industry Anti-trust Litigation*, 589 F.2d 786 (5th Cir. 1979).[189] "[W]e are not willing to create a special category of non-Rule 24 intervention for third parties who wish to challenge protective orders through informal motion."[190]

However the First Circuit, like the Third, Fifth and Eighth Circuits, was prepared to allow the Public Citizen challenge to proceed, albeit with the caution that parties following should not look to that allowance as permission to ignore the Rule 24 requirement.

Courts, including this one, routinely have found that third parties have standing to assert their claim of access to documents in a judicial proceeding. *E.g., In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 354 (11th Cir. 1987); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *In re Globe Newspaper Co.*, 729 F.2d 47, 50 n. 2 (1st Cir. 1984); *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981)[. . .][191]

However, not all courts are willing to advance such standing as illustrated by *Oklahoma Hospital Assn. v. Oklahoma Publishing Company*, 748 F.2d 1421.[192] The Tenth Circuit required that the intervening party, the publishing company, establish standing as a threshold requirement. The court quoted the Supreme Court's standing requirements in a 1982 case, "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant.'"[193] Further, the court rejected the publishing company's claim because it did not, "Arguably fall within the zone of interests to be protected or regulated by the statute or Constitutional guarantee in question."[194] In *Hospital Assn.*, the court concluded that the publishing company could not show an injury to itself nor could it assert a First Amendment claim based on the rights of third parties. Finally, the court noted that the First Amendment right belonging to the hospital association or the department included the right to speak and the right to remain silent.

On the other side are the cases represented by *State ex rel. Bilder v. Township of Delavan*, 334 N.W.2d 252 (Wis. 1983). In that case the court upheld the right of the intervening newspaper to move for the opening of the court file in a controversy between a town council and its police chief.[195] The court recognized the narrow definition of interest as adopted by other jurisdictions, but concluded that the issue should be decided differently. "In deciding whether to allow a party to intervene as a matter of right, the court should view the interest to allow the intervention practically rather than technically."[196]

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[189] The cited portion of Rule 24(c) states: "A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which the intervention is sought."

[190] Public Citizen v. Ligget Group, Inc., 858 F.2d 775 (1st Cir. 1988).

[191] Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 787 (1st. Cir. 1988).

[192] The case involved an action in which the hospital association challenged the Oklahoma Department of Human Services over changes in the reimbursement process. The parties obtained a protective order and the publishing company sought to intervene to allow public access to the documents produced in discovery.

[193] Oklahoma Hospital Assn. v. Oklahoma Publishing Co., 748 F.2d 1421, 1424 (10th Cir. 1984). Quoting Valley Forge Christian Church v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

[194] Ibid. Quoting Association of Data Processing Orgs. v. Camp, 397 U.S. 150, 153 (1970).

Some Suggestions for Resolving the Issue

Any proposal to deal with the problem of secrecy in civil proceedings and records as pertains to media access and resulting public awareness must deal with a number of issues as presented already. Texas Supreme Court Justice Nathan Hecht cited a trio of significant concerns a few weeks before the court approved its record sealing rule.

> The three principle areas that the rule has to address are - what are court records, does it include -obviously it would be things filed with the court - is it less than that. Is it only those records which are acted upon by the court in making an adjudication, is it everything that is filed with the court? Does it include things not filed with the court - including discovery and settlement agreements when they are not filed with the court? You have those issues - what's the scope of it.
>
> Secondly, what's the standard of decision - should it be easier to do or harder to do, what's the showing that's required to decide whether to seal or not. Who has the burden of proof, who has the burden of going forward. Who can attack, who has standing to complain one way or the other. You have all those issues. Just how the sealing issue is presented before the court.
>
> Then you have the procedural issues of given that this is the standard and this is what it applies to, how does it happen, when does something get filed, when is it reviewed, how is it appealed, what's the standard of appeal, is there res judicata, collateral estoppel, is the rule retroactive, all those kinds of issues.[197]

The Texas Supreme Court has resolved, at least initially, those questions, taking the lead in the area of access to sealed court records.

The Virginia Legislature passed a statute in 1989 regulating the dissemination of discoverable materials that, in part, addresses some of the concerns relating to sealed records.

> Section 8.01-420.01. Limiting further disclosure of discoverable materials and information; protective order.
>
> A. A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter, with permission of the court after notice and an opportunity to be heard to any party or person protected by the protective order and provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order.
>
> B. The provisions of this section shall apply only to protective orders issued on or after July 1, 1989.[198]

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[195] This case involved a statute providing for examination of public records. W.S.A. 803.09(1,2), Stats. 1981-82.

[196] State ex rel. Bilder v. Township of Delavan, 334 N.W.2d 252 (Wis. 1983).

[197] Interview with Justice Nathan Hecht in March 1990.

[198] Code of Virginia Annotated, 1989 Cumulative Supplement, p. 130.

But while this addresses the issue of denying discoverable information to other plaintiffs, it does not deal with the First Amendment consideration of public discussion of the issues.

The Fourth Circuit enunciated a test for sealing court records in *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984). Although a case involving criminal prosecution, the procedures have been applied where a right of access is recognized for civil cases. "[R]epresentatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'"[199] "When a closure motion is made in open court, persons present must be given notice and an opportunity to object before the public can be excluded."[200] The Fourth Circuit applied the procedure set forth in *In re Knight* in *Stone v. University of Md. Medical System Corp.*, 855 F.2d 178 (4th Cir. 1988). "The public's right of access to judicial records may be abrogated only in unusual circumstances. The procedures mandated by *Knight* ensure that the decision to seal records will not be made lightly, and make possible meaningful review of a decision to seal."[201]

Application of Relevant Factors

Justice Hecht and the other Texas justices were flooded with materials from advocates of all sides during their consideration of the proposed Rule 76(a) and revision of Rule 166b(5). In the weeks before the court took up the matter, he evaluated the issues involved in the conflict over sealed records.

> There are really two primal forces that are legitimate. There are a lot of forces I don't regard as worthy of much consideration. But the two legitimate interests are the public's interest in an open judiciary, in the decisionmaking processes of the government and it applies to the judiciary, legislative, executive within bounds.
>
> No one has seriously suggested that the internal deliberations of our court be made public and I would think that that argument would not go very far. But there are areas of the decisionmaking process of this branch of the government just like any of the other two that require openness. And by the same token, generally what is obtained during the course of a proceeding, of a judicial proceeding, the information that is obtained from a party, is either by subpoena or by the force of the Rule or, even if its by agreement, its knowing that the rules are going to apply and that we just, we don't dispute it, and when that information, which parties are not ordinarily required to divulge to the public, is taken from them by the force of law, because of a legitimate proceeding which must be adjudicated, what continued interest in privacy do they have after that proceeding has been concluded? None, some, of paramount? Those to me are the two competing interests.
>
> There are, as I said, a number of illegitimate interests, curiosity is not in my view a legitimate interest and the fact that some member, some person may want to know the sordid details of unrelated people's divorce does not entitle a person to, in my judgment to go to the courthouse and get it when he otherwise couldn't. The profiteering is not a legitimate interest, whether it be legitimate in the sense of pirating trade secrets or information, or illegitimate in the sense of using the information for illegal purposes, extortion, threats.
>
> On the other hand, neither is insistence upon keeping information secret when it is the kind of information that ought to be known because of the position of the declarant in the public, whether he is a manufacturer of goods or is a seller of services or whatever that's its important that the public know that this has happened and sooner or later he is going to be required to divulge it anyway to regulatory agencies or other offices or whatever and keeping that secret for secret's sake doesn't seem to me to be a legitimate interest.

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[199] In re Knight Pub. Co., 743 F.2d 231 (4th Cir. 1984) at p. 234, citing Globe Newspaper, 457 U.S. at 609 n.25, and Gannett Co. v. DePasquale, 443 U.S. 368, 401.

[200] Ibid. Citing In re Globe Newspaper Co., 729 F.2d 47, 56 (1st Cir. 1984); In re Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1984); and Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983).

[201] Stone v. University of Md. Medical System Corp., 855 F.2d 178 (4th Cir. 1988), at p. 182.

> The legitimate interests vary, trade secrets, proprietary information, information that costs money to obtain and assemble, information that could be used to great advantage by someone else who's not entitled to see it. Common personal privacy, just so that your whole personal business is not a subject of public comment anymore than anybody else's is. Those vary. But the two big interests are the legitimate interests of the public and the legitimate interests of privacy.[202]

In balancing the various competing interests put forth by the various groups involved in the sealed record issue as well as constitutional considerations, this paper concludes that the following proposed model rule would serve both the legitimate interests of the public at large and the parties in particular when dealing with matters sought to be protected. This proposed rule draws from the Texas Proposed Rule 76(a) as well as materials in the cases dealing with the issue.

Model Rule 1.

A. Openness. There shall be a presumption of openness in civil court proceedings except for those areas delineated by statute.

B. Definition:

1. The term court record shall include all papers, documents and exhibits listed with the court in the course of litigation from the commencement of the suit through the termination of proceedings through settlement, disposition by trial on the merits or dismissal for grounds allowable in the rules of procedure.

2. The term good cause shall include those considerations relating to trade secrets and privacy of the parties relating to the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.

3. The term trade secret shall mean a "formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[203] marked

4. Media shall include any representative of a recognized or recognizable press organization which numbers among its chief functions the dissemination of information to the public at large or targeted audiences.

5. Access shall mean to include the opportunity for examination of court records, as defined above, in a manner specified by the court which will not interfere with the efficient functioning of the justice system. However, the opportunity must be meaningful and timely so as not to void the purpose of this rule.

6. Threat to public health or safety shall mean to be any condition or situation in which any product sold or made available to the public or any service rendered which affects members of the public that is associated with a risk of death, serious injury, serious illness or reduced life span.

C. Media/Public Access to Court Records. The media, as defined above, and the public shall be afforded an opportunity to examine all court records relating to civil cases in which a threat to the public health or safety is involved.

D. Exclusions. Exceptions to Section B shall be made only in cases where a party can show either the threat to a legitimate trade secret or a legitimate privacy interest, as defined above in Section A, when such interest clearly outweighs the potential for public harm. Before an exception is made, the court must exhaust all other means to preserve the recognized interests to be protected.

E. Procedure. When a party wishes to move for the exclusion of court records from media and public access, the party must make a motion before the court, make public notice, allow for intervention by either parties or the media and public, and argue the motion.

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[202] Interview with Justice Nathan Hecht in March 1990.

[203] Restatement of Torts Section 757 comment b (1939) as quoted in United States v. International Business Machines Corp., 67 F.R.D. 40, 46 n.9 (S.D.N.Y. 1975).

1. Notice. Notice shall be made in accordance with the local rules of court pertaining to public notices. The moving party shall file with the court a description of the type of court record sought to be excluded and the general reasons for seeking the exclusion. That description and rationale shall be filed with the court at the time the request for exclusion is made and a copy shall be made available for public inspection at that time and a copy shall be inserted into the permanent court file.

2. Intervention. Intervention to oppose or support a motion to exclude court records is a matter of public right.

3. Hearing. Hearing must be conducted within 20 days of a motion to exclude. The court records to be excluded must be tendered to the court for an in camera inspection and all parties and intervenors must be accorded an opportunity to present evidence bearing on the closure request.

4. Decision. The trial court shall render a decision based on the evidence presented at the hearing and the in-camera inspection of the court records sought to be excluded. The decision shall be announced in open court and an explanation of the reasons for excluding the court records shall be both publicly posted and made a part of the permanent court file.

5. Appeal. Any intervenor may appeal the trial court's ruling on a motion for exclusion.

F. Standard of Review. There shall be de novo review of the decision of the trial court on matters of exclusion of court records and the reviewing court shall again weigh the trade secret or privacy interest against the presumption of openness in court proceedings.

This proposed model rule includes delineation of protectible matters in the realm of legitimate trade secrets or those aspects of privacy that the U.S. Supreme Court held were encompassed by a "penumbra of privacy" in *Griswold*. It includes a general right of intervention to allow interested parties on either side to address the issue. There is a presumption of openness, but that comports with the general reading of the criminal cases and an analysis of the reasoning of the civil cases to date.

Chiefly, the benefit to a model proposed rule is the effect of letting the bench know the circumstances when closure is appropriate. Further, it should reduce time spent arguing over protective and confidential orders by setting forth a clear standard beyond which parties would not travel. As noted above, in many cases, attorneys take advantage of harried judges struggling with crushing caseloads who may not know exactly what results their protective orders may have for the public.

In terms of the public benefit, the Congressional Research Service addressed the issue in a 1989 report, "Confidentiality and Secrecy Orders in Civil Cases."[204] The report stated that "consumers might benefit from dissemination of information concerning the product," and the report stated in a footnote:

> If a confidentiality order is imposed after a product liability lawsuit is settled, and the subject product is still on the market or in use, a confidentiality order could arguably prevent the public from being made aware of the potential for injury. In some cases the public might only need to be alerted to the existence and nature of the complaint to take steps to avoid a similar situation.[205]

The media can be a powerful force to bring government action in cases where products pose threats to the public.

> During the last eight years, the Bic Corporation has been quietly settling injury and death and death claims resulting from allegedly defective cigarette lighters at a clip of one every two weeks - a total of more than 200.
>
> Bic's low-profile approach to its legal problems ended last year when several newspapers

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[204] Kenneth R. Thomas, Confidentiality and Secrecy Orders in Civil Cases, Congressional Research Service - The Library of Congress, April 3, 1989.

[205] Ibid. At p. 3.

> reported that, according to court records, 10 deaths had been linked to Bic butane lighters that suddenly exploded. Those disclosures stirred a congressional probe that concluded that Bic and other popular brand lighters failed, at times, to even meet their industry's own safety standards.[206]

That media-instigated pressure need not be the result of pressure by investigative reporters and editors. Consider the case of Miracle Recreation Equipment's merry-go-rounds. Federal safety officials contacted the company in 1974 in response to a report that a 4-year-old girl's ankle was crushed by a merry-go-round at an Atlanta nursery school. Newsday reported that the company disclosed only three of 14 merry-go-round accidents involving its equipment and the investigation was concluded. In 1982, a University of Texas education professor, who was employed as an expert in a case against Miracle Recreation, appeared on a radio talk show.

> By chance, a federal safety agency official happened to tune in during a discussion of the Bounce-Around Whirl. Frost was subsequently contacted by agency investigators, and he sent them the documents collected by Corlden.
>
> The result was a 1986 civil suit in which the Justice Department charged Miracle with failing to reveal reports of injuries to as many as 80 children, some 25 lawsuits, damning engineers' reports and even Miracle's own decision to recall the whirl in 1980 after dozens of accidents were reported.[207]

The Practical Considerations

There is yet another component to the issue of access to court records - the practical effects of access on the functioning of the justice system. Here the arguments often boil down to a matter of money - will parties force more expensive litigation if records are more accessible; will settlements grow less likely and trial more prevalent if the terms are not kept secret; will defendants escape justice by keeping knowledge of discoverable, but damaging, records from the public and similar plaintiffs; and will public perceptions of the justice system force changes.

In judicial analysis of the balancing of public access interests against restrictions on disseminations, appellate courts have considered the impact on public perception and accountability. Although the court denied media access to the exhibits used in the completed products liability trial of *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3rd Cir. 1988), the court noted the value of public access to the justice system. "Public access serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness."[208]

Howard Swindle, an editor for the *Dallas Morning News*, citing his newspaper's series on secrecy in hundreds of cases in the Dallas County court system, said, "These examples could send a message that in Texas - should you be wealthy enough or prominent enough - you can conduct your potentially embarrassing lawsuits in the privacy of a judge's chambers instead of a public courtroom."[209]

The cases and controversies reported, at least other than "Sealed v. Sealed," show a compelling need to forestall secrecy in the judicial branch of government. The democratic process relies on the free discussion of matters of public interest and observance of the mechanics of government. The media stand in stead for each citizen of the state who has neither the time nor the technical ability to understand the conduct of justice. Therefore, as those cases favoring openness might well argue, let the light of day shine on this form of government and let the media reflect that light into as many corners as possible.

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[206] "System Thwarts Sharing Data on Unsafe Products," Newsday, April 24, 1988, p. 24.

[207] "Legal Merry-Go-Round," Newsday, June 5, 1988, p. 21.

[208] Littlejohn v. BIC Corp., 851 F.2d 673 (3rd Cir. 1988).

[209] "Secrecy in the Public Domain," David McHam, The Texas Policy Research Forum, 1990.

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"Radio and TV Marti: Search for a First Amendment Theory of Government Expression in the Marketplace of Ideas"

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"Radio and TV Marti: Search for a First Amendment Theory of Government Expression in the Marketplace of Ideas"

*Introduction

Freedom of expression in the marketplace of ideas has come to be known as the first freedom underlying all other freedoms in a democracy. But government's introduction of its voice into the international marketplace of discussion via Radio Marti and TV Marti has raised some difficult and yet unresolved questions about the general theory of freedom of expression in the United States.

From its very inception, Radio Marti represented an aberration in U.S. broadcasting policy. The radio station which went on the air in 1985 to broadcast news and information to Cuba now raises several serious questions about the adequacy of present First Amendment theory on government expression and about the nation's information and communication policy.

Perhaps the most serious question is that of how to resolve the conflict between the marketplace conception of free expression and the rationale for the policy censoring Marti broadcasts as outlined in the Smith-Mundt Act.[1] The Act which established the U.S. international broadcasting outlets also contains a provision which prohibits the domestic dissemination of news and information produced by the government for foreign audiences.

The restriction on dissemination of government information has been called, "the most egregious, little-known restriction on the press in America."[2] The law was recently challenged in

Federal Court by a newspaper publisher in Iowa and challenged indirectly by two radio stations in Miami when they rebroadcast Radio Marti programs in violation of Federal Communications Commission rules.[3]

The genesis of the idea for a surrogate home broadcast service to Cuba appears to have been contained in the "Santa Fe" report, prepared in 1980 by a group of scholars and security analysts to formulate a new policy toward Latin America. And in the spring of 1981, "a member of the Reagan Administration's transition team espoused the idea of special broadcasting to Cuba as a part of a "confrontational" policy approach toward the island."[4]

The Presidential Commission on Broadcasting to Cuba was established by Executive Order 12323 on September 22, 1981. The Commission was to come up with recommendations on how the Reagan Administration could "break the Cuban government's information monopoly" and "satisfy the Cuban people's thirst for reliable information about their own country."[5]

In order to break Castro's censorship barrier and promote the Cuban people's right to know about world affairs and what was going on in their own country, the U.S. launched what has been called "a peaceful, legal and non-confrontational foreign policy initiative in the national interest."[6] The Administration further infuriated Castro by naming the station after Jose Marti "the father of Cuban independence."

With the recent congressional approval of TV Marti, the Bush administration has apparently decided to stay the course and to continue surrogate broadcasting to Cuba as part of its foreign policy.[7] The launching of this latest telecommunications torpedo --TV Marti-- in the continuing Cuban-American war of words makes the need for the United States government to develop a coherent national information and international broadcasting policy strikingly obvious. Even more obvious is the need for a First Amendment theory for treating government speech and the role of government information in a democracy.

Examination of the international broadcasting policy, the Act under which Radio Marti's parent organization the Voice of America was created, and of the recent challenges to the dissemination ban shows that the communication policy is inconsistent with First Amendment philosophy and the legal status of the domestic audience's right to receive information and views from a diversity of sources. It also provides an opportunity to outline possible theoretical and legal foundations on which to grant constitutional sanction to government expression.

*Section I. Legal Restraints on Government Expression

The Smith-Mundt Act: Censoring Government Speech

The Smith-Mundt Act was written two years after World War II ended and in the heyday of hysteria over combating international communist propaganda about the United States. The Act is also the foundation of what might be called the U.S. information/communication policy. The Act not only provides the basis for the free flow doctrine, it also contains provisions antithetical to the free flow ideal.

Under Title V, Section 501 of the Act, the Secretary of State is authorized to prepare and disseminate to other countries, information about the U.S., its people, and its policies using all available forms of media, information centers and instructors abroad. Section 501 also states that press releases and radio scripts used to carry out the mission should be made available on request to representatives of the media, student researchers and scholars, and to Members of Congress "for examination only."[8]

It should be noted that the sponsors of the original bill to set up the so-called Voice of America (VOA) did not impose the safeguards that now restrict the flow of government information from the U.S. Information Agency (USIA) to the American people. The bill, H.R. 3342, was introduced in the House by Rep. Karl Mundt of House Un-American Activities Committee notoriety. Although Mundt and his Committee were occupied with rooting out communists and countering their propaganda, they did not see fit to restrict the American audience from receiving USIA programs. Instead, there was talk of how to get the program transcripts to the media requesting them in the quickest and cheapest manner.

Section 501 of the Act was first revisited by Congress in 1965 in a joint House and Senate resolution.[9] But during the intervening 17 years since its passage, Section 501 had, in the eyes of some members of Congress, taken on an implicit prohibition on government's active domestic dissemination of USIA materials. In 1965, Congress found it necessary to grant what it called an exemption from the prohibition on domestic dissemination to allow the showing in the United States of a USIA film about President Kennedy.[10] Since that first "exemption," it has always taken an Act of Congress for USIA films to be shown to the domestic audience.

When the USIA legal counsel determined that "there was not a specific prohibition in the law" hindering the Agency from disseminating its materials, Senator J. W. Fulbright, who was chairman of the Senate Foreign Relations Committee which was debating a bill on other USIA activities, proposed an amendment aimed specifically at changing the language of the Act to prohibit domestic distribution of USIA information.[11] Fulbright acquiesced to allowing USIA to fill public requests for information. He said access was necessary given the difficulty for all citizens to come to Washington to inspect agency files.

The Foreign Relations Committee reported the amended bill, S. 1030, to the Senate on May 16, 1967 with a recommendation that it be passed. The measure was defeated by a vote of 47 to 31.[12] The 90th Congress apparently did not think it imperative to make explicit the ban that the committee mistakenly said was supported by legislative history and original intent.

In re-drafting the legislation in 1972, Congress inserted what it considered safeguards to prevent the U.S. government from "propagandizing" its own people just as Adolf Hitler and Dr. Joseph Goebbels reportedly propagandized the Germans in World War II. Fulbright put Section 501 at issue in 1972 by trying to restrain Senator James L. Buckley from showing the film "Czechoslovakia 1968" on New York TV stations to update his constituents. Fulbright interpreted the Act as prohibiting any dissemination of USIA-produced information.[13] He wrote to the Department of Justice and asked that it "take action forthwith to restrain the domestic dissemination of this film."[14]

In an attempt to block Buckley from showing the film, Fulbright asked for a legal ruling on the Act as amended by the 1965 joint resolution. Acting Attorney General Richard G. Kleindienst found that the showing of the film would be within the existing law. And citing the government's unsuccessful attempt to restrain the New York Times from publishing the Pentagon Papers, Kleindienst advised Fulbright that, "we do not believe that the Department of Justice could or should obtain a court order restraining the proposed showing of 'Czechoslovakia 1968'."[15]

Moreover, Kleindienst told Fulbright that he (Fulbright), like the Members who debated the 1965 amendment, held "some misconception about the existing law." Kleindienst said the congressional intent of the 1948 statute "was to make USIA materials available to the American public, through the press and Members of Congress."[16]

The Attorney General did say, however, that the legislative history of the Act and the 1965 amendment in particular, "do reflect Congressional concern that USIA, as a federal tax-supported agency, not engage in domestic propaganda activities."[17] Kleindienst ruled that the Act did prohibit USIA from actively engaging in domestic dissemination of its materials but that it also mandated that USIA provide its materials to others upon request to do with it what they will, Senator Buckley's film not withstanding. At no time since the enactment of the law in 1948 was there ever any question about the right of those requesting USIA materials to receive a full, verbatim copy of those materials for their use outside the walls of the State Department.

Finding that it was mistaken about the intent of the law based on the Attorney General's ruling, the Foreign Relations Committee concluded that, "there is an obvious need for a specific prohibition against the domestic dissemination of any USIA materials."[18] The committee drafted just such a prohibition in Section 204 of the Foreign Relations Authorization Act of 1972. The committee, hoping to avoid later misinterpretation stated clearly what was the intent of the proposed amendment to Section 501. According to Senate Report 92-754, "This provision is a blanket prohibition barring public distribution of any and all materials produced by the United States Information Agency."[19] The committee was so thorough in ensuring its information blackout that dissemination was prohibited even in U.S. territories and possessions.

Despite Congress' attempts to lay the domestic propaganda monster to rest in the 1972 measure, the creature reared its ugly head again in the 1985 floor debate on the State Department and USIA authorization bill. Senator Edward Zorinsky of Nebraska raised the issue again when he offered an amendment to S. 1003. Zorinsky said the amendment was "to prohibit USIA from engaging in domestic propaganda and to restate the existing prohibitions on domestic dissemination of USIA products."[20]

The text of the amendment also prohibited USIA from using its funds to "influence public opinion in the United States." It was the use of tax money to spread propaganda that Zorinsky was particularly opposed to. He argued that, "The American taxpayer certainly does not need or want his tax dollars used to support U.S. Government propaganda directed at him or her. My amendment ensures that this will not occur."[21]

Zorinsky was successful. The Senate approved his amendment and it became law under Section 208 of Public Law 99-93. The law states that "no funds authorized to be appropriated to the United States Information Agency shall be used to influence public opinion in the United States, and no program material prepared by the United States Information Agency shall be distributed within the United States."[22] Congress had finally codified an explicit ban on all domestic dissemination of USIA materials. Because the amendment was not in the draft bill, there was no committee discussion on it.[23] So based only on the fear of propaganda described by Zorinsky, Congress approved the ban. It is ironic that in the same bill banning domestic dissemination of USIA programs, the lawmakers also made an exemption to the law and released three USIA films for domestic viewing.[24]

Zorinsky said the Smith-Mundt prohibition that he sought to reinforce was what distinguished the U.S. as a free society from the Soviet Union where "propaganda is a principal government activity."[25] It might be argued that in an attempt to eliminate domestic propaganda, the Congress has used the Act over the years to make censorship a major congressional activity.

This legislative safety net has produced a heavy hand of government paternalism and censorship that is still part of U.S. information policy. More importantly, the dissemination ban is an apparent contradiction in the marketplace, free flow of information philosophy espoused by U.S. policy makers. It amounts to government censorship of the flow in the domestic information market. This contradiction has been allowed to stand because of the characterization of government as a low-value speaker and its subsequent legal treatment as an illegitimate participant in marketplace discourse.

*Section II. Review of the Literature

Government Expression in the Marketplace

In the system of freedom of expression, government is forbidden from silencing private speakers although it is often called upon to regulate some aspects of private expression. Government action is sometimes necessary to settle disputes between private speakers when their free expression rights conflict or when there is a claim of unjust injury resulting from expression. Not only is government constitutionally barred from silencing speech, it must also be even-handed in settling private disputes and in regulating private speakers. "But none of this means that government cannot add its own voice to the many that it must tolerate, provided it does not drown out private communication."[26]

The issue of government speech in the marketplace is confounded by the preference given to individual First Amendment rights to speak and to listen to other private speakers over any right of the government to express opinions and to communicate information. This is necessarily so because unlike individuals, government has no self to fulfill or realize, and no autonomy to exercise. Court cases involving government speech have turned on viewing government speech as action against individuals to burden their First Amendment rights rather than considering government as a legitimate and equal speaker with the same right to enter the marketplace as others. Based solely on its identity, government is treated as a low-value speaker in the marketplace.

For the most part, First Amendment scholarship on the government's role in the marketplace has focused almost exclusively on the government as regulator. The role of government as speaker in the marketplace is given scant treatment in treatises on constitutional law and in casebooks on the subject. Only one book has been written exploring the topic in depth and less than a score of law review articles have been written on this specific point of law.[27]

The works that do exist focus on the presumed dangerous effects of government speech on the market or on the expression rights of private speakers.[28] But rather little attention has been given to analyzing the process of affirmative attempts by government to speak for the sole purpose of getting ideas and information into the market.

Instead, the literature discusses the common themes of whether government ought to be allowed to speak at all, government expression as interference with the rights of private speakers, and the distorting effects of government speech on the market. Most of the legal scholars conclude that there is little merit in allowing government to speak anymore than is necessary to carry out the business of the people. They often justify this restriction on the fear that government expression will propagandize the people.

Government is viewed as a monolith with a powerful and dangerous voice that some say can interfere with other speakers in the market by drowning them out or chilling them from uttering what they desire to say. A combination of these two effects supposedly leads to government monopoly of the marketplace. This monopoly, some argue, allows government to falsify consent because government is then able to set the agenda of issues and to control the context of their discussion. This opens the door for unlimited and unrefuted government persuasion and advocacy of positions and opinions on election issues. It is argued that government monopolization of the market for its own expression is equivalent to brainwashing a captive audience and has the same effect as censorship in establishing official orthodoxy.[29]

Few legal experts agree that the government's point of view ought to be heard. Those who would forbid government from advocating a position have argued that there is a danger in exposing the government's voice in all instances. Consequently, most of the literature on government expression outlines arguments for restricting government speech. The problems of government speech is spread over several themes. The most salient of which is the manipulation and falsification of consent theme. This abuse of communication power is decried not only because of the identity of the speaker--an admittedly unequal player in the marketplace arena--but also because government uses taxpayers' money to fund its advocacy.

With its perceived great powers for abuse, government has been characterized as illegitimate to participate in the marketplace of ideas. Early in the nation's existence, "James Madison wrote that government speech stood on a different footing from private speech, was a potential threat to representative democracy, and could be limited or censored as the people wished."[30]

*Section II-1.
First Amendment Theorists on Government Speech

First Amendment theorists, legal scholars, and political philosophers disagree on what is or ought to be the constitutional status of government expression. Most conclude that government has no constitutional speech rights and that there is therefore no First Amendment issue concerning government expression. In their view, government ought to keep out of the marketplace of ideas except to act only as a referee of disputes between private speakers. Theorists argue that government has no self to fulfill and therefore that and other intrinsic First Amendment values of freedom of expression do not apply.[31] They therefore conclude that, "The problem of freedom of speech in the constitutional sense simply does not arise when the government itself is doing the speaking."[32]

Thomas I. Emerson, perhaps the most often quoted First Amendment theorists, said government expression is a "necessary and healthy part" of the system of freedom of expression and that government's participation in debate "also greatly enriches the system." But Emerson also concluded that "government participation in the system also brings with it serious dangers."[33]

Emerson also characterized government's voice as an overpowering voice that drowns out other voices, distorts the market, and chills private speech and dissent. He outlined four problem areas of government speech. In addition to the "problem" of government monopolizing debate and thereby distorting the system of free expression, Emerson said the other dangers are: "government expression used as a sanction against exercise of the right to expression by private persons and groups; government expression that causes injury to individuals and social interests outside the system of freedom of expression; [and] government expression addressed to a captive audience."[34]

Emerson would allow all government expression that is part of its official function and not in the four danger categories he outlined. He concluded that despite government's powerful voice, its participation in the marketplace allows the system of free expression to remain viable as long as "other voices are free to reply and criticize."[35]

Franklyn S. Haiman, another prominent First Amendment theorist, reached the same conclusion about government expression as Emerson did. He too sees virtues and problems in government's participation in the market. Haiman said, "Communication from government officials becomes problematic, however, when they use the time and resources made available to them by the taxpayer's money to promote their partisan political goals, to enhance their personal careers, or to diminish the reputations of other people."[36]

Haiman recognized that elected government officials must communicate with the public and are encouraged to do so in order to make their views known although they have greater access to media than private speakers and also greater perceived credibility. Despite all the communication advantages of government, Haiman is concerned not with keeping government's voice out of the marketplace of ideas but with "whether others are able to talk back, and to do so with a fighting chance of prevailing."[37] Haiman argued for "a legally enforceable right of access to privately operated mass media" in order to increase the chance of prevailing and to facilitate free expression generally in the marketplace of ideas.[38]

Writing about the government's influence on the Mind, Tussman brushes briefly on the issue of government participation in the forum.[39] Unlike the other commentators on this topic, he does not characterize government's voice as something to be feared and silenced. To the contrary, Tussman contends that government expression aimed at influencing the minds of citizens is not only legitimate but an essential responsibility and obligation. According to him, "Government is a primary producer of information and we expect it to provide us with much that we need to know."[40]

He also pointed out that:

> ... government is involved in the very fabric of the forum. The forum is not something we have before government takes a hand

> and which is "free" until government intrudes. It is a system in which government is a constitutive element. To say that government should, in the name of freedom of speech, leave the forum alone is like saying that government should, in the name of justice, have nothing to do with courts.[41]

*II-2. Summary of Yudof's Book

Legal scholars have recognized that, "The affirmative use of official authority and public resources for partisan ends surely deserves closer scrutiny by the legal community."[42] Mark Yudof's 1983 book was the first and only full-scale attempt to put government expression under that scrutiny. And, "As the first to deal extensively with the traditionally ignored issue of government speech, he clearly is at the forefront of a trend."[43]

Yudof is comprehensive and exhaustive in marshalling evidence for what he sees as the problem of government speech. He cites such distinguished social scientists and communications researchers as Lazarsfeld, Bauer, and Schramm. He reviews the communications literature on the "bullet theory" and "two step-flow" models of information and media effects.

Although the book is dedicated to pointing out the ills of government speech, Yudof likes government expression when it promotes values he would consider democratic. He also sees value in such expression when it is essential to the deliberations and official workings of government in promoting the democratic process and when it contributes to producing the "self-controlled citizen."

Yudof elevates the individual values of the First

Amendment--promotion of self-fulfillment, autonomy, and self-control--above the structural, collective and societal values of free expression. In short, he subverts the benefits of the marketplace of ideas for the collective listening audience to the benefits of free expression derived by individual speakers. He argues that in almost every case, government expression undermines individual autonomy and self-control because of what he sees as its tendency to indoctrinate, brainwash, and create automatons incapable of independent thought or action not directed by the powerful communication messages of the state's bidding.

Yudof spends most of his time and energy outlining the dangers of government speech and the potential for abuse were such expression to gain constitutional protection. He lists the public education system as the area of greatest potential for government abuse and indoctrination. The power of the President to call press conferences and to commandeer TV time can also be abused according to Yudof. Government power to pressure broadcast licensees into carrying public service announcements is often abused because government and its sympathizers take up a large portion of free air time and squeeze out dissenting voices.[44] And finally, the ability of government advertising to influence the public may be abused. Yudof pointed out that the publicity efforts and expenditures of the USIA are second only to efforts by the Department of Defense to promote and recruit for the volunteer army.

Yudof's greatest concern about government expression is what he argues is its tendency to falsify consent. According to him:

> ... government may so seek to indoctrinate the public as to engineer false consent by producing citizens with a mind-set supportive of the leadership and its policies. This may be accomplished by bombarding the populace with information and opinions favorable to the leadership and its policies, or by withholding information that might lead to adoption of unsympathetic points of view.[45]

Yudof offered the following definition of consent:

> It is the opportunity of citizens, groups, or organizations to influence those who govern and one another that is critical, and not whether on any particular issue they choose to do so, or whether 50 percent of the people plus one favor a policy. It consists of a mutually affecting relationship between the people and their rulers in which government affirmatively promotes choice and respect for the individual's autonomy.[46]

After reviewing the history of what he characterized as government abuse of its powers of expression and reviewing the literature on communication theory and effects research, Yudof concluded that "extrinsic limits on government speech are desirable."[47] He comes to the conclusion to restrict the free flow of government information despite his admission that based on the empirical findings of communication scholars and theorists, the impact of communication cannot be determined.

Yudof points out that his proposal is very much like the informal checking system that already exists where Congress has placed restrictions on government expression "it perceives as propagandizing."[48] The ban on domestic dissemination of USIA materials produced for foreign audiences is among those restrictions singled out by Yudof as "credible" steps by Congress in its role of "protecting democratic government from the falsification of majorities through government communications" and meeting its responsibility to "guard against executive branch attacks on the self-controlled citizen."[49]

Perhaps Yudof's fear of government speech caused him to err on the side of restraint instead of freedom given the lack of evidence that what he fears really exists. In fact, the book presents a good bit of evidence that there are political, structural, and psychological limits on government's persuasion power and the possibilities for its abuse. The evidence he presents in many ways challenges his thesis that government speech ought to be feared.

He is forced to recognize the ineffectiveness of government propaganda even under the ideal conditions where government can bombard a captive audience with its single perspective on a single communication channel. Yudof said "it is axiomatic that some forms of indoctrination (for example, rehabilitation programs in prisons) are rarely effective." He blamed the ineffectiveness of the supposedly powerful propaganda message on such factors as the maturity and stubbornness of the listeners.[50]

Professor Mark Tushnet delivered a scathing review of Yudof's work. Tushnet characterized the book as an "annoyance."[51] According to Tushnet, the real problem that Yudof hints at but does not really address is that "our government is not democratic in any interesting sense. But because he thinks that it is, he has to reduce the problem to one of substantive government speech."[52]

But based on his thesis that government speech is a problem, Yudof is guilty of accepting the arguments of his critics, who he said have nothing to offer in the debate but a crippling hopelessness and despair about the political system.[53] He characterized his critics as paternalistic ideological polemicists, that "assume the efficacy of government communications and the mass media in terms of shaping individual thought and behavior."[54] This powerful effects view for communication is central to Yudof's argument that government speech has the ability to falsify consent by drowning out dissent and discussion of alternative policies to those advocated by government.

Yudof's fear of government speech rests on the assumption that government officials can, with a cornucopia of loud and presumably powerful messages, propagandize the public by usurping their evaluative capacities and ability to make free choices. Under this view, government speech is not like any other speech but because of its source and subject, it has a greater impact than its rational content justifies. In accepting this proposition, Yudof skirts the important question of whether all choices in pluralistic democracies are similarly constrained.

He does not confront what Tushnet calls the real perils that he introduced--the assumption of rationality and the hierarchical conception of pluralistic government. By proposing a ban on government communication that has a tendency to falsify consent,[55] Yudof admits that the evaluative capacities of citizens can be disabled by government speech. He further indicates that he believes human beings are not always rational in dealing with marketplace communication.

This is indeed a peril because:

> Traditional free speech theory rests on the assumption that, except in some carefully delimited situations, listeners have the capacity to evaluate the messages they receive and to choose among them. .... It [Yudof's thesis] therefore questions the premises of traditional free speech theory."[56]

Tushnet criticized Yudof for his failure to seize the opportunity to explore this obvious and important contradiction.

Instead, Yudof dwells annoyingly (to use Tushnet's term) on the evils of "bad" government speech and the virtues of "good" government speech. But he is not successful in explaining how it is that the expression--based on its source--is good in one instance and bad in another. Nor does he explain how the citizen lapses in and out of rationality to avoid questioning speech that Yudof would sanction as permissible government indoctrination in democratic values.

*II-3. Themes in the Literature

A few authors are forerunners of Yudof. Others merely echo him on the general themes about "the problem" of government expression. The most pervasive theme in their writings, as in Yudof's work, is fear of the power of government's voice and its supposed ability to propagandize.[57] According to one commentator, "A prominent theme in this 'government speech' debate is that the government's powerful voice can easily overwhelm weaker private voices, creating a monopoly of ideas and inhibit-ing the dialectic on which we rely to reach decisions."[58]

The secondary legal literature also discusses the point that Haiman made about the inequalities between government and private speakers in terms of access and credibility. These other commentators also conclude that the other marketplace speakers are no match for government's powerful voice and seemingly unlimited resources. In Nowak's view:

> We should not assume that the private economic interests will be able to respond adequately to the government speech. Although there will be persons with a financial interest in rebutting the government's speech, the government is in a unique position to dominate the marketplace because of the extent of its economic resources, and its ability to increase its resources through the taxing power.[59]

According to Richard Delgado, a law professor at the University of California-Davis, "Government speech in the area of nuclear weaponry evokes powerful images that terrify and numb the listener, or make him or her an insecure, compliant follower."[60] He explained that the normally capable listener becomes compliant in the face of this powerful government speech because government ensures a monopoly on the discussion by weakening or negating market forces that ordinarily work against control of the market. The listeners are also overwhelmed "by virtue of psychological characteristics of the debate itself."[61]

Delgado advocates curtailing government expression on the nuclear arms issue rather than the corrective measure of more speech because of the ability of government to block effective refutation of its views. He argues that government can distort the market by denying access to information, classifying information as national security secrets, and even classifying the effective response of a would-be critic. According to him, this type of government speech "would be a good candidate for unconstitutionality" because it promotes a controversial political premise, enforces orthodoxy, and threatens to drown out opposing voices and views--all dangers of government expression.[62]

These perceived dangers of government communication arise from its identity and resources as a speaker. Indeed, Yudof also advances this theme that the prestige and status of government will give its voice an advantage over private speakers in the competition of the market. This "drowning out" theme chronicled by Yudof is echoed by most of the other writers. Yudof said, "There is the danger that a well-heeled government might so dominate the opportunities for mass communications (which are not infinite) that individual voices would be drowned out."[63]

Schauer also rejects this argument that government speech drowns out other voices in the market. According to him, "this aural metaphor is ill fitting" given that the market is filled with all kinds of media outlets each available to the individual regardless of the quantity of other items. "Thus, even if there is much more government speech than private speech, we are not compelled to conclude that private speech cannot reach the public or that the public is unable to learn of its existence." [64]

Schauer argues that government speech ordinarily does not drown out public speech, and it is therefore not a First Amendment problem. He said plenty of anti-government views are available:

> ... and because almost no segment of the media seems unwilling to criticize the government when the occasion arises, it is unlikely that government speech has any special persuasive powers by virtue of its governmental origins. On the contrary, anti government biases may be so great, particularly with reference to the veracity of political leaders, that much government speech may encounter a public strongly predisposed to disbelief.[65]

Another prominent theme in the literature is that government expression, in most cases, is an impermissible interference with private speakers' First Amendment rights. The commentators point out that government speech drowns out some private speakers and has a "chilling effect" on others. They use these secondary effects of government expression to illustrate that government interference poses such dangers to individual expression and to the political process that it should be judged unconstitutional. One legal scholar wrote that:

> Although more subtle than censorship, official partisanship [thorough] the affirmative act of disseminating propaganda in support of a partisan viewpoint may pose as great or greater danger to political rights of free expression.[66]

Others argue that government expression allows the manipulation of consent and is a gross interference with democracy. One constitutional law scholar wrote:

> Government speech poses especially difficult issues because many of its features go to the heart of democratic theory. The legitimacy of government depends on the consent of the governed, but that consent is influenced, and, indeed, sometimes manipulated by the government itself.[67]

The charge of manipulation is bad enough but legal scholars also take issue with the fact that the public ends up paying for the falsifying government speech. "The government's use of public resources to manufacture citizen support for a partisan viewpoint on political issues raises serious questions concerning the integrity of the democratic process," according to one writer.[68]

It has already been demonstrated in the discussion of the legislative history of the Smith-Mundt Act that "Congress, recognizing that a propaganda agency should not propagandize the taxpayers who are paying for the program, forbade USIA to distribute its material in the United States."[69] But one has to ask if it would be any less repugnant to the political process if the government's message was not financed by public funds?[70] To the extent that there is a "problem" with government speech, the problem must be with the message or with the right of government to make the expression and less with who pays for the dissemination.[71]

Because of this perceived threat of falsifying consent, it has been argued that government ought not to express its views on issues before the electorate. Ziegler concluded that "official partisanship is not speech protected by the first amendment, and in fact, that amendment rights of the citizens themselves militate against permitting unrestrained official partisanship."[72]

Many have advocated using the First Amendment as a tool to limit government expression in the furtherance of individual freedom of expression and protection of the democratic process. Several of the experts, including Yudof and Nowak have argued that the press clause of the First Amendment provides constitutional grounds for just such a limitation on abusive government expression.

Yudof asserted that even in instances where government expression did not interfere with individual speech rights but with the democratic process, it ought to be limited. He said that government advocacy of unlawful or unconstitutional behavior ought to be limited even without meeting the incitement test that protects such expression by private speakers. He would silence government speech aimed at overturning the political structure of the nation. Yudof reasoned that, "Under these circumstances, the First Amendment should be employed as a substantive limit on what government says."[73]

Nowak too fears government attempts to influence public opinion and to engage in all-out propaganda. He would have the government speak to the people only through a caretaker private mass media to be sure government does not promote a point-of-view or engage in socio-political commentary. His proposition is to use the press clause of the First Amendment to limit and discourage government from speaking directly to the people and to have the Court mandate a right-of-reply to government speech at government's expense for those who disagree with the government's position.[74]

According to Nowak, this should be done by granting private mass media constitutional status as a branch of government[75] and prohibiting government media outlets from competing with and usurping private media. "Applying Blasi's analysis to press clause problems, we could find that the press is a type of constitutionally recognized special prosecutor that operates in the court of public opinion rather than in a court of law."[76] According to Nowak, "Such a view of the press clause is necessary to fully protect the marketplace and checking functions of the first amendment."[77]

Under the proposal, "Any diminution in government speech should be seen as enhancing, rather than diminishing the first amendment marketplace and checking values."[78] He proposed this system of safeguard because, "When the government speaks to the public through the press, such as through a press conference or the distribution of information to the press, the members of the media can add other viewpoints to the government's presentation of the information."[79]

Nowak recognizes two distinct marketplaces for the free flow of information--one domestic and one international. And under his system, the Smith-Mundt prohibition would remain intact. He said:

> The press clause principle applies only when the government speaks directly to the American public. The principle has no application to government speech directed to persons in other countries. Thus, the principle would not limit government speech through radio broadcasts to other countries. While one might question whether such broadcasts are a legitimate function of a government that should respect free speech values and international law, I do not believe that press clause values are impaired by such broadcasts."[80]

In any case, the American audience's right to receive information is not being respected under current interpretations of either the free speech or free press clause.

Nowak wants to preserve the marketplace by forcing government out of it. This is a questionable proposition if the market is viewed as a forum for maximizing discussion of all types. Enforced silence on government would amount to closing a portion of the market rather than enhancing and enlarging it. And how better to check on government that to hear what it has to say and to know what it is up to. Government abuses and misdeeds are more often cloaked in secrecy and covert actions rather than overt and bold propaganda measures to brainwash an entire population. There would be little to discuss or to check on if silence prevails in the marketplace.

In his attempt to preserve the marketplace, Nowak desecrates it and commits the same fallacy as those who advocate the Smith-Mundt domestic ban on USIA information. Nowak, like others, assumes that government speech and advocacy are inherently evil and so overpowering that the audience cannot properly evaluate the government's voice and treat it like any other in the market.

The problem of checking on government and countering its expression is made even more complicated by the fact that some other level or branch of government is often called on to restrain government expression when the self-righting marketplace principle is thought to be inadequate. "But this appears as idealistic as government regulation of the private sector to further the cause of those unequally situated in communications markets."[81]

Delgado is another expert who advocates using the First Amendment to place limitations on government speech. Delgado joins Yudof in warning of the dangers of powerful government speech and the need to suppress and regulate it so it cannot subvert democracy by falsifying consent. He wrote:

> The imbalance between government's powerful voice, magnified by communications technology, and less-powerful private voices can result in falsification of consent. According to government-speech theorists, falsification of consent problems arise when government uses speech, not to effectuate the will of the people, but to manufacture that will without popular consent or conscious participation.[82]

Delgado's thesis is that government promotion of nuclear armaments and strategy is deceptive and that, "the one-sided views that the government propagates are unlikely to be corrected in the marketplace of ideas because of the widely shared human response mechanisms and official secrecy."[83]

Delgado argued that the marketplace will not work to promote discovery of truth because government communication on nuclear arms is loaded with deceptive measures such as euphemisms, weasel words and outright lies which manage the flow of information and effectively silences dissent. According to Delgado, limits must be placed on such government speech because, "The ability of weapons-talk to still or bypass rational thought processes suggests that the messages conveyed are less likely than are other communications to be challenged effectively in the marketplace of ideas."[84]

According to Schauer, the text of the First Amendment prevents government speech from being a first amendment problem because government speech does not constitute the abridging action prohibited by the amendment. Schauer explained that:

> Courts have not yet held that the uses and abuses of government speech noted by Yudof and others present cognizable first amendment claims, ... courts consider government communication to be a function of the state that is not constrained by the limitations of the first amendment."[85]

He added that, "Moreover, the incidental presence of communication should not, by itself, change a problem of abuse of power into a problem under the first amendment."[86]

I agree with Schauer's conclusion that, "The assumption that government speech is likely to have a highly distorting effect on the trade in ideas is an assumption that goes not to the question of government speech but instead to the roots of the very idea of freedom of speech."[87] So far, whenever the roots have been examined, the literature has not adequately discussed the role and value of true government expression independent of government's regulatory actions and their secondary effects on the rights of other speakers. And therefore, the theorists and legal experts have yet to come up with a First Amendment theory that includes government speech as just another voice adding to the diversity under the marketplace notion.

*II-4. Public Broadcasting and Government Speech

Legal scholars have distinguished government-sponsored domestic broadcasting from all other forms of government speech that ought to be feared and censored. National Public Radio (NPR); the Public Broadcasting System (PBS), the government television network; and the Corporation for Public Broadcasting

(CPB), the quasi-government organization that funds them; are treated with less opprobrium than other media outlets because they don't represent the "official voice" of government. In fact, the communication content of these entities is not treated as government speech because the government does not exert direct control over their operation or the program material they broadcast.

In 1967, the Ford Foundation gave a $10 million grant to the Public Broadcast Laboratory (PBL) which eventually grew into PBS, the national public TV network. The Public Broadcasting Act of 1967, provided government subsidy for constructing and operating noncommercial educational TV and radio stations in the United States.[88] The legislation also continued support for programs distributed by the educational stations through the National Educational Television (NET).

Provisions of the Act prohibit government from exercising supervision of the programming content of these public broadcasting outlets. It is in the cases involving these government-financed stations that we get the greatest discussion about government speech in the domestic marketplace. But even these cases have more to do with government action as regulator--or potential regulator--of the public stations than they have to do with government inserting its voice in the forum.[89]

Citizens' groups and the courts have been vigilant guards of the public broadcasting system to make sure government does not try to speak to the American public, even secondarily through regulation.

It has been argued that because public broadcasting has a small portion of the total national audience and because it is provides primarily educational and cultural programs rather than news and editorials, "Government thus has more incentive to seek to influence commercial broadcasting than it does to control the fledgling noncommercial system." In fact, "Federal funding of noncommercial programming has led to few charges that public television is a propaganda arm of the executive or legislative branches."[90]

When PBL went on the air in 1967 it was anything but a propaganda mouthpiece for the government.

> Mindful of its function as an alternative voice, it dipped into work of fringe theaters, cabarets, and underground films, and inevitably reflected the angry subculture. The thrust of the message was anti-war, anti-racist, anti-establishment; ...[91]

The very first program PBL presented was the off-Broadway play "Day of Absence." The play dealt with racism in the South and was complete with white characters played by black actors in "whiteface" makeup.[92]

In fact, it has been charged that the entire public broadcasting system was created by the government to increase marketplace diversity and to act as a national safety valve by granting the increasing dissatisfied black population access to media. Upon assuming office, the first chairman of the CPB reportedly commissioned research on "how public television might be used for riot control."[93]

Despite the potential for manipulation and abuse, "State ownership of a television or radio station (regardless of whether it is an NPR or PBS affiliate) could be justified as an attempt to provide a forum for private speech similar to the state operation of a park or theater."[94] These entities were created by the federal government while refusing to grant a public right of access to broadcast stations given the audience right-to-receive rationale underlying all broadcast regulation. These government broadcast stations may be characterized as government's affirmative promotion of debate in the marketplace although with the usual heavy hand of paternalism.

*Section III. The Real Legal Problem

The Problem of Insidious Government Speech

"Not all forms of government speech are permissible, however, and the most troubling instances of governmental expression are often the most subtle and insidious."[95] Constitutional law scholar Laurence Tribe cites the labeling of communication by foreign governments to U.S. citizens as "political propaganda" as an example of subtle and insidious government speech. Under the Foreign Agents Registration Act of 1938, agents of foreign governments are required to submit copies of any communication intended for circulation in the U.S. to the Attorney General who has the power to label the origin of the communication and to designate it as political propaganda.[96]

The Court upheld the Justice Department's continued use of the labeling law when the Act was challenged by a California state senator trying to avoid the stigma of the government's label on three Canadian films that he wanted to show.[97] Two of the films were about acid rain and the other about nuclear war.

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According the dissenting opinion in the case:

> The Act grew out of the investigations of the House Un-American Activities Committee, formed in 1934 to investigate Nazi propaganda activities in the United States and the dissemination of subversive propaganda controlled by foreign countries attacking the American form of government. The Act mandated disclosure, not direct censorship, but the underlying goal was to control the spread of propaganda by foreign agents. ...
>
> In 1942, Congress revised the Act at the request of the Department of Justice in order to strengthen the Government's 'chief instrument ... for controlling foreign agent activity in the theater of political propaganda.'... The amendments included the definition of propaganda in addition to labeling and reporting requirements virtually identical to those imposed under the current version of the Act. ... And, as in the original Act, the amended version furthered Congress' desire to disable certain types of speech by the use of disclosure requirements designed to bring about that result.[98]

A recent law journal article brilliantly analyzes and criticizes the Court's ruling in the case and correctly identifies the propaganda labeling requirement as government asserting its right to participate in the marketplace under the guise of properly regulating the communication of other participants.[99]

It must be noted here that the Court focused narrowly on the supposed speech right of the government to inform the public by warning it against the contents of the Canadian films via applying the propaganda label to them. Instead, the real government speech issue in the case is the official condemnation of the message in the films that the government sought to convey to the private audience by putting its stamp of disapproval on them. Government's legitimate expression rights would have been better served if it had produced and circulated its own film to counter the Canadian "propaganda" films. The authors of the review argue that in focusing as it did, the Court let stand a content-based system for censoring free speech. Such government regulation has historically been viewed as the most abhorrent violation of the First Amendment and of marketplace principles. The Act could further be invalidated on the constitutional grounds that it forces an unwilling private speaker to carry the government's message--a message that the speaker disagrees with!

The authors of a recent communication law textbook also recognized the Act as government speech in disguise. They asked, "Does government have a right to speak--mark films with the label propaganda--if the consequence of the exercise of such a right is the deterrence of expression in the society?"[100]

The censorship scheme represented by the Act is repugnant because it is affirmative speech by government masquerading as permissible regulation. To the category of such insidious government speech, I would add several other regulations aimed at discouraging or banning communication all together. Among them is the recent case banning abortion counseling,[101] a District of Columbia statute regulating embassy protest,[102] a law banning advertising of casino gambling in Puerto Rico,[103] and the domestic dissemination ban in Section 501 of the Smith-Mundt Act. The Smith-Mundt Act differs from the others in that it involves censoring genuine government speech rather than regulation of voluntary private speech or government forcing others to carry its message in their media.

The other recent cases involving government speech also do not focus on the constitutional right of the government to add its voice to those in the marketplace. Instead they turn on the equally insidious government practice of trying to influence debate by controlling selectively withholding its expressions and enjoining private attempts to further disseminate what government has previously uttered. Again, the debate is conveniently shifted away from the constitutional right, or lack thereof, of government to interject its voice into the marketplace and onto public access, subsidy, and propaganda issues.

The government used this strategy successfully to trammel the First Amendment rights of private speakers who wanted to publicize in the U.S. the government's official voice to the rest of the world. The argument was made that the private speakers had no right to reiterate what the government had said because the communication was deemed off-limits and dangerous for the domestic audience to receive it.

Two Miami commercial radio stations rebroadcast some Radio Marti programs and were reprimanded by the FCC for doing so.[104] In September and October 1987, radio station WAQI (710 AM) rebroadcast a three-minute tape delay of Radio Marti interviews with Cuban defector Florentino Azpillaga Lombard. Station WQBA (1140 AM) also rebroadcast six Radio Marti interviews with Azpillaga from tapes made off the air at WQBA studios. WQBA rebroadcast an additional eight Radio Marti interviews with another Cuban defector and 15 minutes of the Radio Marti inaugural program. Members of Congress called for an investigation by the

Inspector General of the USIA into charges that Radio Marti personnel had made the tapes available to the Miami stations in "violation of the Smith-Mundt Act."[105]

The Inspector General informed the FCC on Nov. 18, 1987 that the stations had admitted to taking the Radio Marti programs off the air but that they did so in ignorance of the Act and FCC regulations prohibiting such rebroadcasts. The investigation report did point out that the Smith-Mundt Act "does not cite any criminal penalties for the violation."[106] The FCC launched its own investigation and notified USIA of the results.

The complaints investigation branch of the FCC's Mass Media Bureau initiated an inquiry into the rebroadcasting affair on Oct. 23, 1987. FCC investigators concluded that the stations were in violation of FCC Rule 73.1207 prohibiting the rebroadcast of another station's programs and signal without written permission.[107]

Broadcasters who violate the FCC rule could pay fines of up to $20,000 per incident and the ultimate penalty of losing their licenses. The Miami stations were fortunate to be given an admonition for the violations. The letters of admonition also warned the stations that the FCC considered the violations a serious matter and that "a recurrence may result in imposition of more severe sanctions."[108]

As stated before, the other major regulation behind which government hides its selective participation in the marketplace is the Smith-Mundt Act. Section 501 of the Act places a whole category of government expression, USIA speech intended for forpretation of the Act.

The court dismissed the case on grounds that "the plaintiffs do not have a right, under the first amendment, to make copies of documents which the USIA uses to disseminate information abroad."[110] The court also dismissed the prior restraint charge saying that "Congress did not intend section 501 to preclude plaintiffs from disseminating USIA information domestically."[111]

The only other court challenge of Section 501 came in Smith v. United States Information Agency, No. C76-483S, slip opinion (W.D. Wash. 1978). The case involved a Freedom of Information Act (FOIA) request by a private citizen, Edwin A. Smith, for a transcript of a VOA broadcast. Smith was listening to the VOA program "Africa in Print" on his shortwave radio. "At the end of the program, listeners were invited to send away for a transcript. Smith did, and got back a letter that said the transcripts could be sent to Africans, but not to Americans."[112]

Smith said he needed the transcript to better judge the policies of the government. The Agency told Smith that Section 501 prohibited it from disseminating the transcript. Smith asked the court for an injunction compelling the USIA to release the transcript. He also argued that if the court ruled that he did not have a right to the transcript, then he would ask that Section 501 be found "unconstitutional as violative of the First Amendment."[113]

The U.S. District Court in Washington denied Smith's request saying that he was "neither a speaker nor an intended recipient of the broadcasts" and therefore could not prevail against the statute on First Amendment grounds. The court further ruled that Smith's demand for the transcript, even under the FOIA, amounted to a request for access to government files and that the court could not compel USIA to make the transcript available to him. The court cited legal precedent that granting citizens access to government files is a matter of congressional prerogative and not a constitutional mandate.

*Section IV - Towards a Theory of Government Expression

The various legal scholars and commentators conclude that if government speech is worthy of any constitutional protection at all, it should get the same low-level protection accorded to commercial speech.

But government expression is a matter of the highest constitutional order because it does involve First Amendment rights historically considered above other freedoms. Government expression takes on constitutional dimensions when the marketplace concept and the audience's right to receive expression are considered. The legal doctrines underlying the regulation of broadcast media (ensuring diversity in debate) and extending protection to commercial speech (audience right to know and receive communication) would seem to make government expression an issue of legitimate First Amendment concern.

Because of the importance of free expression to the self-governing process, Alexander Meiklejohn said that it is the enlightenment of the voters for wise decision-making that is paramount and not the right of every individual to speak in every forum. That is, society should value free expression not for what it does for the speaker, but for the audience enlightenment it provides in facilitating the self-governing process. He wrote that "the point of ultimate interest is not the words of the speakers, but the minds of the hearers."[114]

Meiklejohn explicitly linked the value of free expression in society to the airing of diverse views. His discourse on this point is worth quoting at length. He wrote:

> What is essential is not that everyone shall speak, but that everything worth saying shall be said. To this end, for example, it may be arranged that each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available. But however it be arranged, the vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. No speaker may be declared "out of order" because we disagree with what he intends to say. ... And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous and well as safe, un-American as well as American.[115]

Meiklejohn ascribed to government a positive duty to promote discussion and to enlighten citizens on matters of self-government by adding its voice to the marketplace. According to Meiklejohn:

> ... Congress is not barred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it. ... And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon

> which the success of self-government so obviously depends. On the contrary, in that positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech.[116]

Meiklejohn rejects the thesis of all the other theorists and scholars who have concluded that government speech is a problem in the American system of free expression. He does not ascribe any special powers to government expression over the expression of any other communicator of an idea. So there is therefore no need to fear government's voice. According to him, "To be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval."[117]

In fact, Meiklejohn's absolutist position on the First Amendment would strongly support the argument for constitutional protection of government expression as part of the audience's right to be informed.[118] His prohibition on abridging the freedom of speech can be interpreted broadly as recognition of a freedom of expression right that would include the right to speak as well as the right to hear, or to receive, what is being said. This characterization is not unlike the free flow of information concept that underlies what I call the international First Amendment or the human right to communicate regardless of frontiers.[119] This general communication or expression right is central to U.S. foreign policy and has been advanced as the reason for undertaking international communications activities such as the Radio and TV Marti broadcasting operations.

The U.S. espouses the free flow philosophy as the basis of

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its international information and communication policy. Under the "free flow rationale," individuals are credited with the right to receive all types of information because they will be able make intelligent decisions when given all the facts. Based on this principle, the policy calls for the government to inform the world regardless of frontiers and to let rational people make up their minds about what they read, see, and hear. This is essentially the justification for all international broadcasting.

According to a government report on U.S. information policy, the "free flow rationale" is:

> An extension of the First Amendment prohibition against laws "abridging the freedom of speech, or of the press," and in the sense expressed by Article 19 of the Universal Declaration of Human Rights.[120]

It has been argued that the policy is aimed at exporting to the rest of the world, the lofty principles of the First Amendment to the U.S. Constitution.[121]

Testifying before the House Foreign Affairs Committee in support of Radio and TV Marti, Jorge Mas, chairman of the Advisory Board on Radio Broadcasting to Cuba, used the right to communicate and the free flow philosophy as reasons for Congress to fund the Marti stations.[122]

Citing Article 19 of the UN Declaration of Human Rights, Florida Senator, Lawton Chiles, told the Senate that creation of Radio Marti would ensure the Cuban people's right to know about their government's military involvement in other nations around the world. Chiles said Radio Marti would provide this new information that the Castro regime has kept from the people. Chiles said providing the information would allow the Cuban people to ask, "legitimate questions which will have the effect of holding Cuba accountable for its actions."[123]

*Section IV-1. A New Argument for Marketplace Diversity

It has been suggested that it is folly to attempt to devise a meaningful general theory of the First Amendment to encompass government's participation in the system of free expression. The argument is premised on the fact that, "The government speaks in too many ways with too many different effects for too many different reasons to expect that general theory can be an unfailing guide to easy solutions."[124] Perhaps more significant is the fact that previous attempts at such a general theory have been based on the prevailing view among legal experts and the courts that government expression is a problem and that theories ought to be devised to eliminate the problem by curtailing or silencing government's voice from the marketplace.[125]

My argument for coming up with a workable general theory requires that a new approach be adopted; one that considers government expression not as a problem to be solved but as an important and essential voice to be included in the marketplace to enrich it by providing a unique point of view, new ideas, and to promote more diversity. In the present system of freedom of expression, the right to expression is broadly interpreted as a communication right which includes the right to speak or impart, as well as the right to listen, or to receive information. My new approach aims at outlining a theory that is inclusive rather than exclusive of government speech. And that would demand constitutional recognition of an audience First Amendment right to receive government expression.

This approach breaks ranks with the legal experts who have spoken with a voice of unanimity in the quest to "integrate government speech into our constitutional constellation" by limiting such expression.[126] Previous approaches have focused on identifying areas of possible governmental abuse of its advantage as a communicator and on devising legal doctrines to curb the abuses. The common conclusion of these approaches has been to silence government. A cure that is, especially in the First Amendment context, almost always worse that whatever "problem" may exist. If there is any star more fixed in our constitutional constellation than the prohibition on government censorship it is the guiding star of that prohibition--that unfettered discussion and rational debate are the bases for ultimate individual and societal freedom.

This new approach then calls for treating the government like any other marketplace speaker when the communication expresses government's official point of view. In so doing, we grant constitutional recognition of a government right to place that official point of view into the market for consideration without concerns about the secondary effects of the government's speech upon the market or on other market participants. Paying attention to such secondary effects, as the literature on the topic and some court cases have done, misses the crucial legal distinction between government acting as speaker and government acting as regulator.

In addition to the fallacies and false premises already mentioned, failure to make this distinction is a common error in the previous attempts at integrating government speech into the theory of freedom of expression. Would-be general theorists appear to be so overwhelmed with the possibility of government abuses in the marketplace (and there are legitimate reasons for concern in some instances) that they failed to consider the advantages of genuine government expression.[127]

The desire to limit government expression, born out of a fear of propaganda and falsifying consent, or distorting the political process, contradicts the rationality assumption and undermines the marketplace concept. Countenancing censorship under this irrational view of government speech (almost all fears are irrational) violates the premise of the very marketplace and democratic system that the action purports to protect. The marketplace supposedly works on the power of the idea to gain acceptance once rational minds have received the expression and considered the truth or falsity of the idea. That at any rate is the premise of our experiment with freedom of expression and democracy.

As the next phase of our experiment, we might consider a new philosophical and legal treatment of government expression-- let the government speak and let the people listen! The Court is already well on its way with a smaller version of this experiment in granting constitutional sanction to government's regulation of broadcasting--the electronic marketplace of ideas. Constitutional sanction of government's right to express its official point of view could also be grounded in the compelling interest that the Court has found for protecting marketplace diversity based on what it has recognized as an audience right to receive expression. I have already pointed out that the Meiklejohnian theoretical approach, which has been adopted by the Court, provides support for this audience rights diversity argument in protecting the public's right to receive government expression.[128]

*Section IV-2. Winning With a New Constitutional Argument

The Gartner v. USIA decision, [129] which was also discussed briefly in previous sections, could be used to establish legal grounds on which to review the Court's doctrine on government expression and to sanction a First Amendment audience right to receive government speech. Characteristic of the writings on this subject, the court's opinion did not treat the government expression issue in the case for what it was-- speech and not regulation.

In Gartner, the court treated the government speech issue as just another case in the line of private citizens seeking access to government-held information and of the bombastic press exerting its right to gather news. This was a convenient characterization for the government defendant because the Court has never found these rights to be of great importance and there was therefore a mountain of cases from which to mine a healthy load of misapplied precedent to the misleading characterization of the issue.

On July 31, 1984, Michael Gartner wrote to the Voice of America (VOA), the USIA's overseas broadcasting service, and requested copies of transcripts from some editorials that were broadcast by VOA. Gartner said he wanted to reprint the editorials in The Des Moines Register of which he was president and editorial chairman. Gartner received a letter from VOA Director Kenneth Y. Tomlinson denying his request. Tomlinson told Gartner that Public Law 402 (The Smith-Mundt Act) prohibited him from providing the transcripts. Tomlinson restated Section 501 of the Act which he said prohibited him from making the transcripts available through the mail. Tomlinson apologized for having to deny the request. But he did invite Gartner or his deputy to come to the VOA Public Affairs Office in Washington where the transcripts could be examined.

Gartner wrote back to Tomlinson on Aug. 22, 1984 acknowledging receipt of the letter of denial and expressing thanks for Tomlinson's personal views on the issue. Gartner also asked if Tomlinson's interpretation of Public Law 402 would mean that Gartner could make photocopies of the editorials at the VOA office and then reprint them in The

Register.

On Aug. 29, Rogene M. Waite, a VOA public information officer, wrote a respose to Gartner's letter. In the letter, she said Tomlinson had left the Agency and that the task of interpreting Public Law 402 had been delegated to her. She told Gartner, "you may come by the Agency to read but not copy either manually or by photocopying program materials. Nor are you free to reprint such material in The Register.[130]

The background and facts of the case are clear. Gartner repeatedly sought to obtain and publish Reagan editorials broadcast over VOA. The VOA directors refused to send the transcripts in the mail but always invited Gartner to come to Washington to examine the transcripts. Neither the USIA nor Gartner disputed those facts. What they disagreed on, however, was whether or not the VOA letter interpreting Section 501 as prohibiting Gartner from making verbatim copies and from disseminating the editorials amounted to prior restraint on Gartner's freedom of speech or on The Register's freedom to publish.

Gartner interpreted the Waite letter as a prior restraint and on June 2, 1988, he filed suit against the USIA for violating his First Amendment rights. He was joined in the suit by Ralph Rosenberg and Partnership Independent Press, Inc., a corporation which owns The Ames Daily Tribune newspaper in Iowa. Gartner was the publisher and co-owner of the Tribune at the time of the suit. Rosenberg was an Iowa state legislator and subscriber to the Tribune.

Gartner, Rosenberg, and the corporation (plaintiffs) charged that Section 501 (22 U.S.C. section 1461) as interpreted by the USIA (defendant) infringed on their rights to freedom of the press and freedom of speech under the First Amendment. The complaint, filed in U.S. District Court in Des Moines, Iowa, asked for a declaratory judgment that 22 U.S.C. sections 1461 and 1461-1(a) were unconstitutional and invalid insofar as they purported to prohibit the USIA from disseminating and the plaintiffs from receiving and disseminating in the U.S., information and materials disseminated abroad by the USIA.[131]

The attorneys for Gartner said they were not trying make a case just for press access to government information but rather an argument that the USIA was trying to restrain the media with Section 501. They complained that the case was improperly characterized and argued by the government. Gartner's attorneys charged in their brief that:

> Plaintiffs have from the outset characterized this case as an action for declaratory judgment to determine whether the statute imposes an unconstitutional prior restraint upon them. Defendant has persistently sought to characterize the case as one in which plaintiffs merely seek access to government documents.[132]

Attorneys for USIA maintained that Section 501 and the Agency's interpretation of it were constitutionally sound. The defendant made the following points in the written brief and in oral arguments before the court:

The media have no special First Amendment right of access to government information;

Congress, not the Constitution, determines the degree of access to government documents;

The court lacks jurisdiction to rule on the charge of prior restraint because the plaintiffs show no evidence of concrete injury since the USIA did not threaten or seek to enjoin them;

There is no controversy on the charge of prior restraint because the plaintiffs have access to USIA documents and Section 501 has no sanctions for violation, threat of punishment, or mechanism for enforcement of the dissemination ban;

A letter restating the rule against domestic dissemination without any mention of penalties or threats for violation does not constitute a concrete injury;

There is no history of the USIA blocking the press from disseminating Agency materials even though USIA has had knowledge of the press disseminating its materials in the past;

An affidavit exists stating that the USIA has never sought to enforce violations of the Act;

The statute was properly construed by the Agency because by banning domestic dissemination of USIA materials, Congress' original intent was to prevent the government from propagandize the public;

The public has a right to walk in to the State Department and examine USIA transcripts because the "student researcher" and "scholars" designation of those granted statutory access are not defined by the Agency and no credentials are examined when people show up to look at documents.

The holding in the case was that there was no legitimate First Amendment violation at issue and that citizens and the press are required to go to Washington, and copy by longhand from USIA transcripts whatever they want to know and to communicate about the government's overseas broadcasts. The court treated the case as another in the line of private citizens seeking access to government-held information and of the press exerting its right to gather news--a right which the Court has found to be limited to special circumstances.[133]

The court dismissed Gartner's complaint saying that he had no right under the First Amendment to make copies of the transcripts from USIA overseas broadcasts. Writing for the court, Chief Judge Donald E. O'Brien opined that, "The plaintiffs cannot convert a request for unlimited access to government information into a claim of prior restraints. ... Plaintiffs here have access to the information and they can speak about it in public--they just want more convenient access."[134]

The court said that USIA's position on section 501 may be "inappropriate or even stupid" but not unconstitutional because the plaintiffs raised a hypothetical and speculative charge of injury. And absent a "concrete, factual controversy" as part of the record, the court said its jurisdiction was not properly invoked to find unconstitutional the statute or the Agency's interpretation of it. (at 1195)

Judge O'Brien was unable to strike down the regulation because technically there was no demonstration of concrete injury to First Amendment rights. He wrote:

> Because the plaintiffs have not alleged in their complaint that USIA's refusal to allow them to make verbatim copies of USIA materials at the agency's office is arbitrary, capricious, or inconsistent with congressional intent, that question is not before the court.(at 1187)

But a close reading of the legislative history of the Act demonstrates that Gartner's claim of injury could be supported by the fact that the USIA's refusal was indeed inconsistent with the original intent of the statute as it concerns obtaining verbatim copies.[135]

The crux of the rationale in the Gartner decision was the court's dividing of the complaint into two parts and characterizing the plaintiffs' right to receive information as a request for unlimited and convenient access to government documents. Thereupon, the court was able to avoid discussion of the broader societal right to receive information and focus narrowly on media access to government-held information. The court then quickly concluded that, "the First Amendment does not prescribe a duty upon the government to assure easy access to information for members of the press." (at 1185)

The court found that "Congress did not intend section 501 to preclude plaintiffs from disseminating USIA information domestically." (at 1185) However, the court did not say how, under its findings, the press could practically disseminate the information if the USIA is prohibited by Section 501 from providing the transcripts and the First Amendment does not mandate that the Agency provide them.

The court's suggestion that the media and the public get the USIA broadcasts through the less convenient channels of receiving them in other countries is an impractical and unconstitutional burden upon First Amendment freedoms. The suggestion is even more repugnant to free expression marketplace values given the facts that citizens pay for the communication, they are the subjects of the expression, and the entire communication apparatus was placed in motion to promote the free flow of information and to break down barriers to a supposed international human right to communicate.

And although the First Amendment does not explicitly grant a right to the transcripts, the original legislation gave the press a statutory right to them. The original legislation did indeed say that the press would be able to obtain verbatim copies of the transcripts to disseminate.[136] It was the later congressional amendments of the Act that removed the explicit statutory right to the transcripts by making explicit what the lawmakers mistakenly interpreted as an implicit congressional ban on all domestic dissemination of USIA overseas materials.

The statutory access to the transcripts granted to research students and scholars and to the Members of Congress and the press in general is "for examination only" and not for copying and further dissemination of the material. The right to receive the information is thus greatly burdened by the regulation--the First Amendment rights of both those granted access and the general public who, under the Agency's and the court's interpretation, can rely only on the grantees to receive the information.

The First Amendment may not require that government make it easy for citizens or the press to receive information but it clearly states that government cannot abridge free expression. Even assuming arguendo that the state's interest in riding the domestic marketplace of government propaganda is a legitimate and compelling one, it is doubtful that a complete ban on core political expression is the least restrictive method of realizing that interest.

The regulation is very restrictive on the communication process and unnecessarily burdens the First Amendment rights of the media and the public at large. A far less restrictive measure would be for the government to allow the free flow of its partisan political expression to those who request it but label the communication as "political propaganda" in much the same way it now labels as "political propaganda" the communication of foreign governments to the American audience.

This system, although not the most supportive of the free marketplace concept, would at least be consistent with legal precedent and current practice.[137] The ideal solution would of course be to let anyone desiring to hear what the government has to say receive the transcripts that they request. This would be totally consistent with the nation's liberty tradition and with the marketplace principles on which the First Amendment was drafted and from which a good deal of constitutional precedent has sprung.

*Section IV-3. Argument for Receiving Government Expression

In the present system of freedom of expression, the right to expression is broadly interpreted as a communication right which includes the right to speak or impart, as well as the right to listen, or to receive information. What follows next is an attempt to make Gartner's legal argument using the approach that Section 501 of the Smith-Mundt Act represents a content-based regulation that discriminates based on the point-of-view expressed in core political speech. And as such, the statute is an unconstitutional government abridgement of the audience's First Amendment right to receive affirmative government speech and a vital point of view. This then is an argument asserting that the Act violates the audience's right to receive affirmative government speech and point of view and not an argument for press access to government-held information.

In his analysis of the history of government communications, First Amendment theorist Zechariah Chafee, Jr. said it was unfortunate that Congress imposed the ban on USIA films out of fear of propaganda. This propaganda fear, he said, was based on the fact that the overseas film unit "was thought of as an official or governmental organization with a point of view."[138]

Chafee argued that government's point of view, "much more than facts is needed by us citizens if we are to become conscious that we are partners and not just passengers in the difficult enterprise of government."[139]

Private citizens cannot speak for the government but the government can and does speak on behalf of its citizens. Only the government can make this kind of official communication and in that respect, it is the only one capable of expressing its point of view. The Executive as represented by elected officials, has a right to speak. In the context of the Act, government has not only a right, but a legal obligation to speak. To silence government here would be to "fix" the market on this issue by closing off access to one perspective all together.

"The argument is strengthened by the fact that government is sometimes uniquely situated to gather and disseminate particular types of information. An in some cases governments may be virtually the only entities with resources willing to present a particular side of a public issue."[140] This is indeed the case with the productions of the USIA which are supposed to give the government's view of what America is like.

Extolling the virtues of the dissemination ban, Sen. Fulbright said, "Since much USIA output is composed of a filtered view of the United States and its policies, such a prohibition is eminently sensible."[141] And as outlined in previous sections, Fulbright and other Members of Congress imposed the ban specifically to censor this "filtered" viewpoint.

The USIA transcripts then represent the official governmental viewpoint on the issues that are discussed on the international broadcasts. Certainly, the editorials that Gartner requested represent the views of the Executive. Government's point of view can't be received by the American public without the USIA transcripts and the ability to Rebroadcast USIA programs domestically. Because most of the Agency's broadcasts are in foreign languages, the ability to listen to the programs on shortwave radio does not really constitute public access to this government communication. The language barrier and expense involved in purchasing shortwave radios would put the information well outside the reach of the average American desiring to know what his government is saying about him to the international audience. Nothing short of verbatim copies of the English translation of the transcripts are needed for the intended public oversight mentioned in the original legislation.

The Smith-Mundt ban is obviously aimed at eliminating the government's point of view from the domestic marketplace of debate. The various First Amendment theorists and legal scholars who have proposed limitations on government expression do so because of the dangers they perceive from disseminating government's point of view. In warning of the dangers of government expression, Yudof wrote that, "most importantly, there is the danger that citizens will not perform their self-governing function because the government itself has indoctrinated them to its point of view."[142]

The legislators who revised the Act inserted the explicit ban on domestic dissemination of USIA material because they also said they feared the government's point of view. And because the regulation takes this point-of-view approach to abridging communication, it can only be characterized as a content-based regulation which carries the presumption of being unconstitutional.

In recognizing the audience's right to USIA communication, the Court would be adhering to its new conception of the marketplace which considers the audience's right to diverse views as the reason for the market's existence. The

Court's recently reaffirmed the government's interest in promoting diversity in broadcasting by upholding the FCC's minority preference policies aimed at increasing minority ownership of broadcast stations.[143] It is based on the Court's recent reaffirmation of this need for diversity of views in the market that review of the Gartner case should be granted.

The Smith-Mundt dissemination ban stifles diversity in the domestic marketplace by making it nearly impossible for the general audience to receive the government's point of view on what the country is really like. The ability to receive and evaluate this information is necessary for public oversight of the image of America that is being projected in USIA overseas communications.

It might be argued that VOA/USIA program content does not really reflect government's point of view because disinterested, low-level, public servants produce the materials. It has also been argued that government communications that are comprised of a variety of viewpoints ought to be selected in a neutral manner.

Legal expert Melvin Nimmer said that employees responsible for government communications could not exclude expression because of the point of view it contained. According to Nimmer:

> More controversial (but proper in this writer's view) would be the application of the same standards to a government-produced radio (or television) news program such as the Voice of America. Despite the fact that the subject matter of such programs is often primarily political, insofar as the govern-

> ment employees who write and perform such material have no primary responsibilities other than communication, the requirements of point-of-view neutrality should pertain.[144]

But Nimmer's definition of government speech would exempt VOA materials from that category. He said that government employees whose primary responsibilities are to engage in communications activities intended for public consumption should not be regarded as making government speech. They are simply engaged in making editorial judgments for the government he argued. And in his opinion, those activities represent government as regulator and not as speaker. This however, does not apply in the case of the Reagan editorials that Gartner and Rosenberg wanted to receive.

Nimmer affirmed that government as editor may not make editorial decisions based on the point of view expressed. He also recognized that "government speech may endorse particular points of view without also disseminating contrary views."[145]

It has been recognized by constitutional experts that, "To reduce the potential for abuse, some diversity of viewpoints must be ensured, not by limiting the spectrum of views ... but by providing genuine opportunities for more speech ...."[146] The ban not only limits the spectrum of views in the market, it specifically excludes an important view and discourages rather than encourages more speech. The ban is therefore inconsistent with the general purpose of First Amendment protection.

In recognizing the need of diversity in the market, which includes government's point of view, the USIA programs and transcripts gain constitutional protection. It is important to note that the expression is protected based not only on the right of government to speak but also on the right of the audience to receive that expression. It has been recognized by the most severe critic of government's participation in communication that:

> Constitutional protection for government utterances might be premised not on its rights as speaker, but on the rights of the audience to receive information, to be informed, "to know" in modern jargon.[147]

Precedent in several Supreme Court cases sanction the idea that the right of the audience to be informed is paramount to the speaker's First Amendment rights.[148] But the Court's recognition of an audience right to receive expression in these cases has been criticized as "little more than artistic camouflage to protect the interests of the willing speaker."[149] In any event, the Court did not err in protecting the interest of willing speakers under the First Amendment, even if the protection was secondary.

Of greater significance is the Court's justification of libel law, broadcast content regulation, and its commercial speech doctrine with the "artistic camouflage" of an audience right to know-- or right to receive expression.[150] Libel, the legal doctrine for punishing the communication of deliberate falsehood, is based on the audience's right to receive accurate information in the marketplace quest for truth. Additionally, such information is viewed by the Court as crucial to the democratic process. The very difficult actual malice and reckless disregard standards were erected by the Court to facilitate discussion on public issues and to let play out the self-righting principle of the marketplace.

There is perhaps no greater judicial endorsement of the marketplace metaphor and the Meiklejohnian First Amendment theory than in the Times v. Sullivan landmark libel case. It has been recognized that:

> Meiklejohn's concern for a properly informed electorate surfaced most clearly in the Supreme Court's 1964 decision, New York Times Co. v. Sullivan. ... The Supreme Court overturned the judgment and echoed Meiklejohn's philosophy by emphasizing the need for public discussion of public issues.[151]

The government did willingly enter the marketplace by broadcasting over VOA. It is a willing speaker though it wants to be heard by a select audience.

We may ask, is turning over transcripts of previous broadcasts the same as forcing the government to speak? But the speech was already made. The requesters just wants a copy of it since they did not hear the live version. If Americans have a right to hear the international broadcasts by going overseas to listen to them, they must then also have a right to read the transcript account to make sure they heard right and understood what was said.

There is no additional injury or burden on government in repeating protected and valued speech that it made willingly. Government can advance no privacy interest for remaining silent. Government cannot exert a copyright claim to anything it produces in transacting the public's business. And the national security reasons for remaining silent are effectively removed once government discloses information on international broadcasts.

The legal status of the government speech in question turns not on the right of government to speak but on the right of the right of the domestic audience to receive that expression. Only the audience's right to receive is of importance in this context. Government cannot invoke the individual benefits of free expression to protect its voice. The discussion as to whether the government speaker's First Amendment rights are paramount to the audience's becomes moot. Only the audience right needs to be recognized and protected once government decides to speak. Government expression is for the benefit of the audience and the only way the audience can reap that benefit is by being able to receive the communication.

*Section IV-4. The Strict Scrutiny Review Standard

The Smith-Mundt Act presents a First Amendment issue not only of affirmative government speech, but also of government regulating and abridging protected expression, albeit its own expression. The unconstitutional government action in this case is not the making of the speech but the regulation prohibiting its dissemination. It has already been established in the sections above that government speech is indispensable in the marketplace as a part of the audience's constitutional right to receive expression from a diversity of viewpoints. It has also been established by the Court that regulation that discriminates and abridges expression based on viewpoints should meet the strict scrutiny test of constitutionality. The validity of the Smith-Mundt ban then must be determined by applying this standard to the regulatory actions of government to censor admittedly political expression with the highest order of First Amendment protection.

"Finally, if it is constitutionally protected by the First Amendment, presumably limits on government expression would be infrequent, and the burden would be on those who would curtail it to demonstrate overwhelming necessity."[152] If government expression is classified as protected speech, then strict construction would be appropriate in cases where a restriction on that protected speech is sought. Yudof notes that:

> This situation is the reverse of that normally found in First Amendment cases. Usually it is the government that must justify under strict construction standards the restraint it wishes to impose on speech. In cases where government speech is the issue, this burden of justification is placed on the other party.[153]

To make the situation even more unusual and more complicated, the strict scrutiny test under this reasoning, should also be met by government if it seeks to restrict its own expression in violation of the audience's First Amendment right to receive that communication.

The Smith-Mundt domestic dissemination ban is just such a case. The government expression in question is core political speech and the audience's right to diversity of views in this area is served by the speech. Only government can express its point of view and the expression is therefore crucial to the marketplace process. To abridge the audience's right to receive the expression without first meeting a strict scrutiny standard, would be an unconstitutional violation of its communicative rights.

The USIA actions in Gartner may not have amounted to prior restraint on the Ames Daily Tribune, but they certainly burdened the paper's First Amendment rights and the audience's right to receive communication. Gartner and Rosenberg could have made this argument more compellingly.

The Court has historically frowned upon governmental action that burdens communication absent a compelling interest in regulation. Starting in 1936 with Grosjean v. American Press Co., the Court adopted the position that regulation aimed at making it difficult for the press to operate or at punishing portions of the press for the content of its communication is unconstitutional. In Grosjean, the Louisiana Legislature passed a 2 percent tax on newspapers above 20,000 circulation.[154] The tax came out of attempts by the legendary Governor Huey Long to penalize the New Orleans Times-Picayune for criticizing his administration.

In Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365 (1983), the Court invalidated the imposition of a special tax on the press which burdened First Amendment rights and did not achieve any overriding governmental interest. This later case did not have the historical anecdotes of obvious ill will on the part of the regulators but the Court looked to the potential for abuse in singling members of the press to burden with a taxing scheme. In the intervening years, it had also devised the strict scrutiny test in order to accord the highest protection for First Amendment freedoms. "In short, since Minnesota could not advance any overriding governmental reason for the tax in question, its differential aspect as far as the press was concerned required its invalidation under the strict standard of judicial review now accorded to legislation challenged on First Amendment grounds."[155]

Since the Minneapolis Star decision, the government must meet the compelling interest test, or strict scrutiny when regulation burdens a First Amendment right.[156] This line of precedent could be extended to include the audience's right to receive information and ideas.

The "lower-value" analysis has been used by the Court to channel but not to ban categories of communication.[157] It is mostly applied in upholding zoning laws that confines to one area of a city entertainment involving nudity, adult theaters and bookstores, and other sexually explicit expression. But even in these cases involving "low-value" expression, the Court has not allowed a complete ban on all speech in that category.

The "low" value theory first appeared in dictum of the famous "fighting words" decision, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In Young v. American Mini Theaters, 427 U.S. 50 (1976) Justice Stevens' plurality opinion launched the "lower-value" categorization scheme.[158] The Court used the scheme to uphold portions of a Detroit "Anti-Skid Row Ordinance" that channeled the display of sexually explicit materials into limited portions of the city. In the interest of protecting public morals, impressionable juveniles, and unconsenting adults who may be exposed unwillingly to sexually explicit (low-value) materials they find offensive, the Court agreed to the content-based regulation of protected expression. But the Court did say that the communication could not be banned entirely from the city based on its content.

Justice Stewart in a dissenting opinion said the case was not about content-neutral time, place, and manner regulation of "lower-value" expression. He said the case was properly about the constitutional permissibility of selective interference with protected speech based on content thought to be distasteful. Stewart refuted the "lower-value" categorization scheme as being wholly alien to the First Amendment.

The Court clarified the limits of its ruling in Young v. Mini Theaters when it reviewed another zoning law in Schad v. Mount Ephraim, 452 U.S. 61 (1981). The case involved a statute that completely prohibited nude dancing in the New Jersey community. The Court distinguished its decision in Young v. Mini Theaters saying the law in Schad presented a total ban rather than a mere channeling of displays in a community. The Court found that because the law infringed on protected expression, it had to meet the strict scrutiny standard. The statute did not survive the overbreadth challenge.

Justice Stevens, who introduced the "lower-value" system of analysis, concurred only in the judgment of the Court. He refused to endorse application of the overbreadth doctrine but he did say strict scrutiny was the appropriate level of analysis to maximize First Amendment freedoms. According to Stevens, even protected speech could be regulated and channeled if it is done uniformly by narrowly-drawn content-neutral standards.

In applying its low-value categorization scheme, the Court considers "the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment" and the risk of inadvertently "chilling" high value expression.[159] The USIA editorials sought by Gartner are in the category of expression that the Court has always accorded the highest value. Applying the domestic ban, and therefore this low-value categorization to USIA communication is even more alien to the amendment because the communication is quite clearly core, political speech worthy of the highest form of First Amendment protection.

Such selective interference with protected speech is even more egregious because under the Court's First Amendment doctrine, time, place, and manner regulation of protected speech requires content-neutrality. The defendant in Gartner argued that its actions under dispute were constitutional because it was simply carrying out the legislative intent of the statute. And that intent, according to the defendant was to keep the government from propagandizing the American people. The propaganda categorization of USIA materials is based on their content. And as such, the dissemination ban is unconstitutional.

In City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925 (1986) the Court held that a city ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of residential areas, churches, parks or schools. The Court reasoned that the ordinance was an acceptable regulation of time, place, and manner in channeling expression to avoid so-called undesirable secondary effects of communication activity.

Justices Brennan and Marshall dissented from the majority saying that the secondary effects analysis did not provide enough protection for First Amendment interests but rather concealed the statute's true motive of hostility to the views expressed in the communication. One legal expert characterized the decision as an appeal to the undesirable secondary effects of speech to justify a content-based regulation of protected expression.[160]

In Erznoznik v. Jacksonville, 422 U.S. 205 (1975) the Court applied the overbreadth doctrine in striking down a statute prohibiting drive-in theaters with screens visible from public streets from showing films containing nudity. The Court said that the Constitution does not permit government to decide which types of protected speech government, can suppress in order to shield unwilling listeners or viewers.

As Stewart said in Young v. Mini Theaters, sanctioning a content-based regulation of protected expression rides rough shot over cardinal principles of First Amendment law. The court in Gartner v. USIA is guilty of similarly abusing the Amendment. Both the audience's right to expression (Rosenberg's contention) and the right of the Executive to speak via the USIA were sacrificed by the Gartner holding.

The USIA must have a right to speak, since Congress mandates that it speak. And even if Congress did not mandate the communication, it could not prevent the Agency from speaking if it so chooses. Congress could of course eliminate the USIA but it cannot legislate out of existence the Executive, nor its right to speak. The USIA wants to speak in the U.S. domestic marketplace but cannot because Congress made a law that prohibits it from doing so. And to prohibit willing speakers from making expressions is an unconstitutional prior restraint. The restraint is even more intolerable because it is based on the content of the speech.

In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), the Court struck down attempts by a Chattanooga municipal board to block the performance of the musical "Hair" because members thought it was in the best interest of the community to protect it from obscenities in the performance. Although it did not reach the content discrimination issue, the Court found that the board's action constituted a prior restraint on communication.

In Freedman v. State of Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965) the Court found a Maryland statute requiring submission of films for government approval before showing them to the public an unconstitutional prior restraint. The Court said the law was further invalid because the State had not provided adequate safeguards in its screening and appeals process to guard against undue inhibition of protected expression. In the case of USIA films and other materials, there is no procedure for determining what is propaganda and what is not. Nor is there any appeals process for making available to the public USIA communication the government censors determine to be propaganda.[161]

The Court has also recognized that, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[162] It is egregious to suggest that the Executive should not speak to the American people about foreign policy issues because the domestic forum is inappropriate for its views or the subject matter is inappropriate for the Executive to discuss. Yet that is exactly what the Smith-Mundt prohibition maintains especially in the arguments that the communication is propaganda that will lead to the falsification of consent. It is clearly an unconstitutional, content-based, prior restraint on Executive speech.

Requiring Gartner, Rosenberg, and the press to get USIA materials overseas trammels the First Amendment rights of the press and of the audience. The ban requires press and public to exercise their right to receive in a venue where it is not practical. And even if Congress could within the Constitution channel the USIA's speech out of the domestic marketplace, it cannot require that the domestic audience exercise elsewhere its First Amendment right to receive expression from a willing speaker.

What the court suggests is exactly the reverse of the argument for government broadcasting overseas in the first place. The government itself argues that the USIA programs exist because people in some nations (particularly Cuba) can't get information much less the truth at home.

Government has shown no compelling interest in burdening the free market for its speech by making it hard to receive expression. Nor has it demonstrated any legitimate or compelling state interest in protecting the domestic audience from propaganda. To find such a governmental interest would be to find a justification for censorship. And that would be an ultimate distortion and perversion of the marketplace.

A complete ban on USIA communication amounts to the application of lower-value categorization to protected core, political speech. This was also the case in Boos v. Barry. But in Boos, the Court did return to the issue of speech rather than the effects of speech in determining if regulation aimed at suppression, especially if that expression is political in nature, is constitutional.

*Section IV-5. Summary of Normative Legal Argument

The court also erred in finding that the lack of enforcement of the Act does not constitute an injury to plaintiffs therefore raising a controversy between the parties. The existence of the regulation alone should have been enough to trigger a First Amendment claim in this area of higher value political speech. Regulation, minus teeth and enforcement, still silenced core political expression with the court's sanction. At the very least, Gartner's First Amendment rights were abridged by his not being able to repeat accurately what the government had already told the rest of the world about him and every other American

The defendant's argument can be dismissed wholesale because the unconstitutional action was not in government making the speech but in its application of the statute effectively blocking the audience from receiving valuable expression. By making it hard to get the USIA transcripts in communicable form, the domestic audience's expression rights were abridged--reduced, curtailed, cut short. If left to stand, this could become the new wave of government censorship.

The ruling in Gartner v. USIA should therefore be overturned and Section 501 of the Smith-Mundt Act should be found unconstitutional because they are inconsistent with the philosophical and theoretical foundations of First Amendment freedoms. They are also inconsistent with First Amendment legal precedent guaranteeing the right of the audience to receive communication representing a diversity of viewpoints. And they are illustrative of a gross inconsistency between the government's espousal of the free flow concept as the foundation for its international information policy and its practice of censoring the domestic marketplace of ideas.

The court should review Gartner v. USIA and adopt the appellate argument here because of 1. the First Amendment tradition of freedom of expression based on the marketplace theory and its importance to democratic self-government; 2. The legislative history of the Act which shows no congressional original intent to forbid access to government expression; 3. the merits of the legal argument that offers a rationale to find for the plaintiff on grounds that are consistent with settled constitutional precedent against over broad content-based regulation of core, political expression.

The constitutional analysis should turn not on media right to access government documents but on the first amend-

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ment right of the audience to receive diverse points of view, the responsibility of government of promote discussion in the marketplace, and the philosophical underpinnings of the marketplace in ensuring democracy and holding government accountable.

Content-based viewpoint discrimination is particularly onerous and carries a heavy burden of presumed unconstitutionality. Cases involving such restrictions on expression should, and often are, subjected to the more difficult test of strict scrutiny in judicial analysis of their appropriateness. The Smith-Mundt prohibition, given the legislative history of the Act, the mission of U.S. international communication, and the First Amendment free expression tradition of the nation, should invoke strict scrutiny analysis.

Although government expression is thought to be without First Amendment protection, the individual's right to receive diverse expression gives constitutional value to government speech. The next step is in making it a legally protected voice in the marketplace because even one member of the public may want, or need, to hear it. Government is not coerced or compelled to make the speech but to the effect that government finds it necessary and important to make the speech, then the public has a right to receive, if it so chooses, to hear, and to evaluate the emanations of its government.

In making it difficult or impossible for the public to receive its voluntary expressions, government's secondary action to block reception of the communication would have to be classified as an unconstitutional abridgment of the audience's communication rights. This abridgment is even more odious when government's preemptive action is based on the content of communication that it asserts another audience has a right to receive regardless of frontiers.

*Section V. Conclusion

Granting constitutional status to the audience's right to receive the broadcasts and transcripts of the USIA overseas programs would be consistent with legal precedent on this point of law. The fact that the Court would in the process be protecting the USIA as a willing speaker does not harm but rather promote First Amendment expression values. These very values are perverted by the dissemination ban especially when one considers that the government communication in dispute trumpets the virtues of a free and uninhibited flow of information regardless of frontiers.

The ban is further inconsistent with legal precedent and is repugnant to the nation's tradition of freedom because the government is using the First Amendment as grounds to exert an audience right to be free from supposedly harmful communication. If such a right did exist, it would not be possible for government to have legal standing to invoke it on behalf of the public. What we have in Section 501 is the most insidious form of censorship--the government twisting the First Amendment to conceal from the public, expression it made willingly and on behalf of the public.

In addition, the international information and broadcasting policy supporting Radio and TV Marti and all other USIA overseas communication is based on the right to receive which is being trammeled here at home. The U.S. would be in a much better position to argue for the free flow of information throughout the world if it did not have in place such a gross restriction on the right to communicate.

Footnotes

1. The Smith-Mundt Act is the short title for the United States Information and Educational Exchange Act of 1948; Pub. L. 402, 80th Congress, Approved, January 27, 1948; 22 U.S.C. § 1461. The Act authorized the State Department to conduct international broadcasts via the Voice of America and to undertake other information activities and exchange of individuals to promote increased mutual understanding between the people of the United States and the rest of the world. For the legislative history of the Act see 1948 U.S. Code Congressional Service, p. 1011.

2. Celia W. Dugger, "Propaganda Broadcasts Are for Export Only," The Miami Herald, Oct. 4, 1987, p. B1. Michael Gartner, president of NBC News, made the statement about Section 501 of the Smith-Mundt Act.

3. See discussion of Gartner v. USIA and FCC Rule 73.1207 in section III below.

4. Congressional Research Service, "Radio Marti," research report prepared in response to an inquiry from the Senate Committee on Foreign Relations, June 28, 1982, pp. 4-5.

5. Presidential Commission on Broadcasting to Cuba, Radio Marti Final Report, Department of State, August 17, 1982, Appendix A, p. 2.

6. Salinas, Jose O. "Radio Marti: Meeting the Need for Uncensored Information in Cuba," 19 New York University Journal of International Law and Politics 433-455, (1987), at 433; but see USIA appropriations request 98th. Cong. 1st Sess. 625-26 (1983) at 625.

7. TV Marti was approved on experimental grounds by Congress and sanctioned by President Bush on Aug. 27, 1990 when he determined operation of the station to be feasible and that it would not cause interference with U.S. commercial broadcasting. See; Pub. L. No. 101-246, 104 Stat. 58, 22 U.S.C. 1465 (1990).

8. Public Law 92-352; 86 Stat. 493, approved July 13, 1972. Section 204 of Pub. L. 92-352 amended section 501 of the original Smith-Mundt Act by inserting the ban on domestic dissemination of USIA information and restricting media and congressional use of the information to examination only at the State Department.

9. See Public Law 89-274, S. J. Res. 106, approved Oct. 20, 1965.

10. For congressional debate about the intention of the "exemption" in the 1965 resolution and about the interpretation of Section 501 See Senate Foreign Relations Committee, hearings on

S. 1030, "U.S. Informational Media Guaranty Program," March 21, and April 25, 1967.

11. Senate Foreign Relations Committee, hearing on S. 1030, March 21, 1967, p. 11.

12. _Congressional Record_, June 12, 1967, Senate, p. 15421.

13. Fulbright said Congress insisted on safeguards from future USIA domestic propaganda as a condition for granting the 1965 exemption for the Kennedy film. See Senate Foreign Relations Committee, hearings on the Foreign Relations Authorization Act of 1972, [S. 3526], Serial No. 12971-2, April 20, 1972.

14. Senate Foreign Relations Committee, hearings on S. 3525, 1972, p. 83.

15. Senate Foreign Relations Committee, hearings on S. 3525, 1972, pp. 84-85.

16. Senate Foreign Relations Committee, hearings on S. 3525, 1972, p. 84.

17. Senate Foreign Relations Committee, hearings on S. 3525, 1972, p. 84.

18. Senate Foreign Relations Committee, hearings on S. 3525, 1972, p. 85.

19. Senate Foreign Relations Committee, hearings on S. 3525, 1972, p. 2.

20. _Congressional Record_, Jun. 7, 1985, Senate, p. 7801.

21. _Congressional Record_, Jun. 7, 1985, Senate, p. 7801.

22. See Pub. L. 99-93, title II, section 208, Aug. 16, 1985; 99 Stat. 431; 22 USC 1461-1a.

23. The bill that actually became Public Law 99-93 was H.R. 2068. The House version of the bill incorporated the language of the Senate amendments and it was accepted as a conference substitute. See S. Rep. No. 39, 99th Cong., 1st Sess. 77 (1985).

24. The three films were "Afghanistan 1982: The Struggle for Freedom Continues;" "We Are Afghanistan;" and "Hal David: Expressing a Feeling." S. Rep. No. 39, 99th Cong., 1st Sess. 80 (1985).

25. _Congressional Record_, Jun. 7, 1985, Senate, p. 7801.

26. Lawrence H. Tribe, _American Constitutional Law_ (Mineola, N.Y.: Foundation Press, 1988), p. 807.

27. The only book devoted to a complete analysis of government speech is: Mark G. Yudof, When Government Speaks: Politics, Law, and Government Expression in America (Berkeley, Calif.: University of California Press, 1983). An extensive review of this work is presented section II-2 below.

Other books containing sections on government expression include: Zechariah Chafee Jr., Government and Mass Communications (Hamden, Conn.: Archon Books, 1965) (Part III, "The Government as a Party to Communications, pp. 723-797);

Thomas I. Emerson, The System of Freedom of Expression (New York: Random House, 1970) (Chapter 19, "Government Participation in the System of Freedom of Expression," pp. 697-716);

Joseph Tussman, Government and the Mind (New York: Oxford University Press, 1977), (Chapter 4, "Government and the Forum," pp. 86-126) and;

Franklyn S. Haiman, Speech and Law in a Free Society (Chicago: The University of Chicago Press, 1981), (Chapter 17, "The Government as Communicator," pp. 410-422).

The major law review articles on government expression are: John E. Nowak, "Using the Press Clause to Limit Government Speech," 30 Arizona Law Review 1-50 (1988);

Note, "Governmental Speech in the Democratic Process," 65 Washington University Law Quarterly 209-221 (1987) (authored by David P. Haberman);

Note, "Government-Owned Media: The Government as Speaker and Censor," 35 Case Western Reserve Law Review 707-742 (1985) (authored by Linda L. Berger);

Richard Delgado, "The Language of the Arms Race: Should the People Limit Government Speech?" 64 Boston University Law Review 961-1001 (1984);

Mark V. Tushnet, Book Review, "Talking to Each Other: Reflections on Yudof's When Government Speaks," 1984 Wisconsin Law Review 129-145;

Frederick Schauer, Book Review, "Is Government Speech a Problem?" 35 Stanford Law Review 373-386 (1983);

Steven Shiffrin, Book Review, "Government Speech and the Falsification of Consent," 96 Harvard Law Review 1745-1757 (1983);

Steven Shiffrin, "Government Speech," 27 UCLA Law Review 565-654 (1980);

Edward H. Ziegler, "Government Speech and the Constitution: The Limits of Official Partisanship," 21 Boston College Law Review 578-619 (1980);

Robert D. Kamenshine, "The First Amendment's Implied Political Establishment Clause," 67 California Law Review 1104-1153 (1979);

Mark G. Yudof, "When Government Speaks: Toward a Theory of Government Speech," 57 Texas Law Review 863-918 (1979);

Comment, "Unconstitutional Government Speech," 15 San Diego Law Review 815-838 (1978) (authored by Jay S. Bloom).

One other article should be added to the list although it does not focus exclusively on government expression. William W. VanAlstyne, "The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes," 31 Law and Contemporary Problems 530-552 (1966). Section I of the article, "Control by the Government of Its Own Propaganda," contains some important discussion of government speech.

28. See John E. Nowak, "Using the Press Clause to Limit Government Speech," 30 Arizona Law Review 1-50 (1988) at 8. "Prior to 1977, there was very little scholarly examination of the problem of government speech." This is but one example of the single characterization in the literature of government expression as a problem.

29. See Delgado, (1984). Although Delgado recognizes that a myriad of voices in the three branches of government make up government speech, he nonetheless finds that speech from the Executive branch is dangerous because it, "has a certain degree of enforced orthodoxy, so that the 'voice' that speaks is, for all intents and purposes, monolithic." Footnote 3 at 961-962.

30. Delgado, (1984), p. 988.

31. "The First Amendment has been viewed historically as involving limitations on government, not as a source of government rights. Constitutional rights like those embodied in the Bill of Rights have not been extended to government bodies, but only to individuals and groups within the private sector." See Yudof, (1983), p. 44.

32. William W. VanAlstyne, "The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes," 31 Law and Contemporary Problems 530-552 (1966) at 531; VanAlstyne quoting from John Whitton and Arthur Larson, Propaganda: Toward Disarmament in the War of Words, (Dobbs Ferry, N.Y.: Oceana Publications, 1964), pp. 233-240.

33. See Emerson, (1970), p. 698.

34. Emerson, (1970), p. 699.

35. Emerson, (1970), p. 698.

36. See Note 27, Haiman, (1981), p. 410.

37. Haiman, (1981), p. 421.

38. Haiman, (1981), p. 334.

39. See Note 27, Tussman, (1977).

40. Tussman, (1977), p. 110.

41. Tussman, (1977), p. 99.

42. Ziegler, (1980), pp. 580-581.

43. Frederick Schauer, "Is Government Speech a Problem," 35 Stanford Law Review 373-386 (1983), p. 386.

44. Yudof, (1983), pp. 58-59.

45. Yudof, (1983), p. 152.

46. Yudof, (1983), p. 154.

47. Yudof, (1983), p. 69.

48. Yudof, (1983), p. 186.

49. Yudof, (1983), pp. 186-188.

50. Yudof, (1983), p. 170.

51. Mark V. Tushnet, Book Review, "Talking to Each Other: Reflections on Yudof's When Government Speaks," 1984 Wisconsin Law Review 129-145.

52. Tushnet, (1984), p. 144.

53. Yudof, (1983), pp. 85-89.

54. Yudof, (1983), p. 87.

55. Yudof, (1983), p. 49.

56. Tushnet, (1984), p. 132.

57. See Note 27, Schauer, (1983). Schauer does not accept the characterization of government speech as a problem. According to him, "If the voice of government is only one of many strong voices, ... presupposing that the current state of first amendment doctrine is more or less maintained, ... one wonders why we should consider government speech a problem." (p. 381).

58. Richard Delgado, "The Language of the Arms Race: Should the People Limit Government Speech?" 64 Boston University Law Review 961 (1984).

59. Nowak, (1988), p. 47.

60. Delgado, (1984), p. 979.

61. Delgado, (1984), p. 979.

62. Delgado, (1984), p. 986.

63. Yudof, (1983), p. 155.

64. Schauer, (1983), p. 380.

65. Schauer, (1983), p. 381.

66. Edward H. Ziegler, "Government Speech and the Constitution: The Limits of Official Partisanship," 21 Boston College Law Review 578-619 (1980), p. 580. By official partisanship, the author means the use of public funds to promote government expression on issues that citizens and legislatures must vote on; (Note 12 at 581).

67. Tribe, (1988), p. 810.

68. Edward H. Ziegler, "Government Speech and the Constitution: The Limits of Official Partisanship," 21 Boston College Law Review 578-619 (1980), at 580.

69. J.W. Fulbright, *The Pentagon Propaganda Machine* (New York: Liveright Publishing Corp., 1970), p. 21.

70. See Stuart Elliott, "Praise for Nike, Milk-Bone, Revival Ads," USA Today, Jan. 3, 1991, p. 8B. The author identified as one of the worst and most crass ads of 1990, the attempt by Philip Morris Cos. Inc. to "use the Bill of Rights" by paying for the National Archives' celebration of the 200th anniversary of the document. The article reported that, "Critics complained that the promotion was a sneaky effort to equate the right to smoke with the right to free speech." Elliott also raised some insightful questions about the growing corporate influence on the American political process. There is a mechanism for voters to have some influence over what government does with their tax dollars. A similar mechanism does not exist for the public to influence what Philip Morris and other corporate giants do with their advertising dollars.

71. Ziegler and others point to the legal doctrine against compelling individuals to speak in arguing that the use of taxpayers' money to pay for government communication is a violation of first amendment rights because it is the same as compelling the public to pay for and be associated with partisan views that they oppose. See Abood v. Detroit Board of Education, 431 U.S. 209, 97 S.Ct. 1782 (1977); Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428 (1977); and West Virginia State Board of Education v. Barnette, 319 U.S. 624, (1943).

72. Ziegler, (1980), p. 581.

73. Yudof, (1983), p. 260.

74. John E. Nowak, "Using the Press Clause to Limit Government Speech," 30 Arizona Law Review 1-50 (1988) at 11.

75. Professor Vincent Blasi is most often associated with this fourth branch of government characterization that calls on the press to perform a "checking value" or watchdog function on government abuse as the central meaning of the First Amendment. See Blasi, "The Checking Value in First Amendment Theory," 1977

American Bar Foundation Research Journal 521-649.

Yudof endorsed Blasi's checking function and went as far as to say, "The First Amendment should not only function to ferret out abuses of power, it should also serve to prevent the distortion of the judgment of the people by government expression or secrecy. It should be a check on government indoctrination, not simply a check on government misconduct. ... this means that limitations on government expression itself are as important as the absence of limitations on private speech and association. The value of the First Amendment lies not only in checking isolated abuses of power, but in preserving the very process of majority rule." Yudof, (1983), p. 157.

76. Nowak, (1988), p. 14.

77. Nowak, (1988), p. 34.

78. Nowak, (1988), p. 43.

79. Nowak, (1988), p. 41.

80. Nowak, (1988), p. 35.

81. Yudof, (1983), p. 94.

82. Delgado, (1984), p. 991.

83. Delgado, (1984), p. 962.

84. Delgado (1984), p. 978.

85. Schauer, (1983), pp. 375-376.

86. Schauer, (1983), p. 386.

87. Schauer, (1983), p. 382.

88. Pub. L. No. 90-129, 47 U.S.C.A. sec. 390-401 (1967).

89. The most recent legal cases involving PBS include: Muir v. Alabama Educational Television Commission, 688 F.2d 1033 (5th Cir. 1982), cert. den. 103 S.Ct. 1274 (1983). The case is a consolidated rehearing en banc of Muir v. Alabama Educational Television Commission, 656 F.2d 1012 (5th Cir. 1981) and Barnstone v. University of Houston, 660 F.2d 137 (5th Cir. 1981), cert. den. 103 S.Ct. 1274 (1983). In both cases, viewers protested the cancellation of a controversial program, "Death of a Princess", originally scheduled to air on public television stations in 1980.

The court upheld the right of government to maintain influence over PBS programming decisions as long as that influence is not used by government to "propagandize." The case was treated primarily as one of access to public broadcast outlets and it characterized government as editor of PBS rather than as speaker. The court recognized that government must make editorial judgments for public broadcasting to work and that it must speak to advance public policy. The censorship issue was avoided by saying the alleged unconstitutional action was not intended to suppress expression based on government's official position and that by delegating the editorial decision making to experts who are low-level bureaucrats, (in the case of Barnstone the action was taken by a university vice president) the possibility of partisan propagandizing was eliminated.

In FCC v. League of Women Voters, 468 U.S. 364, 104 S.Ct. 3106 (1984) the Court held that government cannot restrict political editorializing on public broadcast stations to avoid monopoly by private partisan points of view or to avoid government influence over local station programming and funding. Again, the fear of government's addition of its voice or "official view" to PBS broadcasts was not at issue. The Court said that the fear of official propaganda was a speculative claim rather than the compelling government interest that would be necessary to justify a content-based ban on all political editorializing.

90. Yudof, (1983), pp. 125-126. Shiffrin also makes this argument. He said public stations receive a puny subsidy compared to the economic benefits private broadcasters derive from the licenses granted them by government. He also argues that because of this funding arrangement, the message content of private stations come under substantial influence of government. See Shiffrin, (1983), pp. 1753-1754.

91. Erik Barnouw, Tube of Plenty: The Evolution of American Television (New York: Oxford University Press, 1975), p. 398.

92. Barnouw, (1975), p. 398.

93. Barnouw, (1975), pp. 398-399.

94. Nowak, (1988), p. 40.

95. Tribe, (1988), pp. 809-810.

96. 52 Stat. 631-633; 22 U.S.C. 611-621.

97. Meese v. Keene, 107 S.Ct. 1862, 481 U.S. 465 (1987).

98. Meese v. Keene, 107 S.Ct. 1862 (1987) at 1874.

99. See Rodney A. Smolla and Stephen A. Smith, "Propaganda, Xenophobia, and the First Amendment," 67 Oregon Law Review 253-285 (1988).

100. Donald M. Gillmor, Jerome A. Barron, Todd F. Simon, and Herbert A. Terry, Mass Communication Law Cases and Comment (5th ed. St. Paul, Minn.: West Publishing Company, 1990), p. 121. (Hereinafter Gillmor, Barron, Simon, and Terry, (1990).

101. See Rust v. Sullivan, *_____ U.S. ______ (1991), 59 U.S.

Law Week 4451 (May 23, 1991). The Court voted 5 to 4 to uphold revised regulations for implementing Title X of the Public Health Service Act, 84 Stat. 1506 as amended, 42 U.S.C. sec. 300-300a-41, which prohibits doctors and health care workers at facilities that receive federal funds from providing, developing, or disseminating any information or referral services about the use of abortion as a method of family planning.

102. See D.C. Code 1981, sect. 22-1115 making it illegal to display within 500 feet of an embassy, signs critical of foreign governments and their policies for fear that such criticism would expose them to "public odium" and "disrepute." The law was enacted by Congress in 1938; S.J. Res. 191, ch. 29, sect. 1; 52 Stat. 30 (1938). In Boos v. Barry, 108 S.Ct. 1157 (1988), the regulation was ruled unconstitutional on its face as a content-based restriction on political speech in a public forum. The Court found that the statute was not narrowly tailored to serve a compelling state interest (at 1170).

103. See The Games and Chance Act of 1948, codified as amended, at P.R. Laws Ann., Tit. 15, sect. 77 (1972). The regulation was upheld in Posadas de Puerto Rico, 478 U.S. 328, 106 S.Ct. 2968 (1986).

104. See "Stations Rebroadcast Marti Interviews," The News Media & The Law, (Winter 1988), pp. 50-51.

105. USIA, Office of the Inspector General, "Report of Investigation: Alleged Improper or Illegal Dissemination of Radio Marti Broadcast Tapes," (October, 1987).

106. USIA, Office of Inspector General, (1987), p. 5.

107. Federal Communications Commission, Inquiry into the Affairs of WAQI (AM) in Miami, Florida, materials in public inspection files, WAQI station folder, Enforcement Division, Mass Media Bureau (1987); and Federal Communications Commission, Inquiry into the Affairs of WQBA (AM) in Miami, Florida, materials in public inspection files, WQBA station folder, Enforcement Division, Mass Media Bureau (1987).

108. FCC Inquiry, WQBA (AM), (1987); and FCC Inquiry, WAQI (AM), (1987).

109. Gartner v. USIA, 726 F. Supp. 1183 (S.D. Iowa 1989).

110. Gartner v. USIA, 726 F. Supp. 1183 (S.D. Iowa 1989), at 1185.

111. Gartner v. USIA, 726 F. Supp. 1183 (S.D. Iowa 1989) at 1185.

112. Celia W. Dugger, "Propaganda Broadcasts Are for Export Only," The Miami Herald, Oct. 4, 1987, p. B4.

113. Smith vs. USIA, No. C76-483S, slip opinion (W.D. Wash. 1978) at 2.

114. Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (New York: Oxford University Press, 1965), p. 26.

115. Meiklejohn, (1965), pp. 26-27.

116. Meiklejohn, (1965), pp. 19-20.

117. Meiklejohn, (1965), p. 28.

118. Meiklejohn argued that the men who adopted the Bill of Rights planned with care the wording of the First Amendment in order to establish "an absolute, unqualified prohibition of the abridgment of the freedom of speech" that was to hold true in war and in peace and that the constitutional prohibition "holds good today." Meiklejohn, (1965), p. 20.

119. The communication right is outlined in The Universal Declaration of Human Rights, Article 19, adopted in UN General Assembly Resolution 217(III)A on Dec. 10, 1948. The article says, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

120. U.S. Department of Commerce, NTIA Telecom 2000: Charting the Course for a New Century (Washington, D.C.: U.S. Government Printing Office, 1988), p. 141.

121. See Clare Wells, The UN, UNESCO and the Politics of Knowledge (New York: St. Martin's Press, 1987), pp. 79-80.

122. Authorizing Appropriations for Fiscal Years 1990-91 for the Department of State, the U.S. Information Agency, the Voice of America, the Board for International Broadcasting and for Other Purposes: Hearings and Markup on H.R. 1487 Before the Committee on Foreign Affairs and its Subcommittee on International Operations House of Representatives, 101st Cong., 1st Sess., (Committee Print), (1989), p. 103.

123. Congressional Record, Jun. 7, 1985, Senate, pp. S7804-S7805.

124. Steven Shiffrin, "Government Speech," 27 UCLA Law Review 565-654 (1980), p. 610.

125. See Shiffrin, (1980) passim and especially at p. 610 and p. 654. Shiffrin himself adopts this point of view and starts from this fallacious premise in proposing his "eclectic approach" of "definitional and general balancing" for finding "limits of content and structure that need to be placed on government speech."

126. Shiffrin, (1980), p. 571.

127. The "problem" of government speech disguised as permissible regulation is one such legitimate concern. See the discussion above in Section III on "Insidious Government Speech."

128. See Gerald J. Baldasty and Roger Simpson, "The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment," 56 Washington Law Review 365-395 (1981). The authors argue that, "Meiklejohn's own waffling on the breadth of speech that merited absolute protection was reflected in, if not a cause of, the Supreme Court's own wide-ranging application of the first amendment in subsequent libel decisions. ...

Within a year after Meiklejohn's lectures first were published, the Federal Communications Commission (FCC), appeared to be applying his own town meeting analogy to the nation's commercial broadcasting system." (pp. 372-373).

129. *Gartner v. USIA*, 726 F.Supp. 1183 (S.D. Iowa 1989).

130. Plaintiff's First Request for Admissions, Exhibit B, *Gartner v. USIA*, 726 F.Supp. 1183 (S.D. Iowa 1989) (No. 88-337-E).

131. Complaint at 3, *Gartner v. USIA*, 726 F.Supp. 1183 (S.D. Iowa 1989) (No. 88-337-E).

132. Brief for Plaintiff, Reply to Defendant's Response to Plaintiffs' Resistance to Motion to Dismiss, at 3, *Gartner v. USIA*, 726 F. Supp. 1183 (S.D.Iowa 1989) (No. 88-337-E).

133. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814 (1980); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800 (1974); *Houchins v. KQED*, 439 U.S. 1, 98 S. Ct. 2588 (1978); and *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811 (1974).

134. Gartner v. USIA, 726 F. Supp. 1183 (1989), Note 1 at 1185.

135. See discussion in Section I above.

136. See discussion in Section I above. Although the court relies on the intent of Congress in drafting the legislation to justify its finding that the Act does not preclude the plaintiffs from disseminating USIA materials, the court did not go back far enough in the legislative history to see where lawmakers clearly said they intended for the press to obtain verbatim copies of the overseas broadcast transcripts and for the press to disseminate them widely as a measure of additional public oversight.

137. See discussion of *Meese v. Keene* in Section III above.

138. Zechariah Chafee Jr., Government and Mass Communications (Hamden, Conn.: Archon Books, 1965), p. 731.

139. Chafee, (1965), p. 782.

140. Yudof, (1983), p. 46.

141. J. W. Fulbright, The Pentagon Propaganda Machine (New York: Liveright Publishing Corp., 1970), p.150.

142. Yudof, (1983), p. 156.

143. Metro Broadcasting, Inc., v. FCC, 110 S.Ct. 2997, 58 U.S. Law Week 5053 (Jun. 26, 1990) (No.88-453).

144. Melvin B. Nimmer, Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment (New York: Matthew Bender & Company, Inc., 1984), p. 4--99.

145. Nimmer, (1982), p. 4--98.

146. Laurence H. Tribe, American Constitutional Law (Mineola, N.Y.: Foundation Press, 1988), p. 812.

147. Yudof, (1983), pp. 45-46.

148. See Procunier v. Martinez, 416 U.S. 396 (1974) (establishing the right of individuals to receive uncensored mail from prisoners.) Also see the discussion of libel, broadcast regulation, and the commercial speech doctrine at Note 149 and accompanying text.

149. Yudof, (1983), p. 46.

150. See New York Times v. Sullivan, 376 U.S. 254 (1964) (establishing the actual malice standard that public officials must meet to win against a media defendant in a libel case. The high standard was set to open up public debate and further the interest of the audience in receiving robust discussion on all points of view.)

See Red Lion Broadcasting Co. v. FCC, 399 U.S. 367 (1969) (establishing the power of the FCC to regulate broadcasting content in the interest of the listening audience by ensuring fairness and diversity of views in programs.)

See Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); and Bigelow v. Virginia, 421 U.S. 809 (1975) (establishing the audience's right to receive truthful commercial advertising.)

151. Baldasty and Simpson, (1981), p. 376. See also Anthony Lewis, "Annals of Law: The Sullivan Case," The New Yorker, Nov. 5, 1984, p. 52 ff. "A year after the Sullivan decision, in a lecture at Brown University dedicated to Meiklejohn, Justice Brennan explicitly drew the analogy between the Meiklejohn phi-

losophy of democracy and the reasoning in New York Times Co., v. Sullivan." (p. 69).

152. Yudof, (1983), pp. 43-44.

153. Yudof, (1983), footnote no. 25, p. 44.

154. 297 U.S. 233, 56 S.Ct. 444 (1936).

155. Donald M. Gillmor, Jerome A. Barron, Todd F. Simon, and Herbert A. Terry, Mass Communication Law Cases and Comment 5th edition (West Publishing Company: St. Paul, Minn., 1990), pp. 127-128.

156. In Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722 (1987), the Court applied the strict scrutiny test in invalidating a sales tax on press profits because the regulation made a content-based determination of which media outlets to apply the tax to. The Court found the statute unconstitutional because it burdens rights protected by the First Amendment.

157. The following categories of speech have been identified by the Court as low value speech: incitement to lawlessness, libel, fighting words, commercial speech, obscenity, and child pornography.

158. See Philip J. Prygoski, "The Supreme Court's 'Secondary Effects' Analysis in Free Speech Cases," 6 Cooley Law Review 1-35 (1989). Prygoski argues that dicta in Justice Stevens' opinion also gave rise to the secondary effects analysis that accompanies low-value speech. He also argues that, "the Court is taking first amendment analysis to its least common denominator by using low-value speech analysis in core first amendment speech cases." (p. 10) He cited Renton and Boos as cases in which the Court erred by applying the secondary effects analysis.

The argument that USIA materials ought to be banned because they will have the secondary effects of propagandizing the public and falsifying consent would be subject to the same criticism.

Prygoski concludes that only be applying the highest degree of protection to core first amendment expression can the Court give "adequate consideration to the marketplace of ideas envisioned by the drafters of the first amendment." (p. 35).

159. Stone, (1983), pp. 194-195.

160. Frederick Schauer, 1987 Supplement to Constitutional Law, (11th ed.) by Gerald Gunther (Mineola, N.Y.: Foundation Press, Inc.), p. 178.

161. The staff of the House Foreign Affairs Committee views USIA films to determine if they can be released domestically by exempting them through legislation. (Personal interview with

Richard McBride, staff consultant, House Foreign Affairs Committee, in Washington, D.C. (Oct. 20, 1989).

162. Schneider v. State, 308 U.S. 47 (1939).

FREEDOM OF EXPRESSION AND THE AMERICAN MIND:

HAZELWOOD IN ACTION IN PENNSYLVANIA

by

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Americans weaned on the fresh air of freedom and fundamental fairness are offended when the deck gets stacked against the little guy. As a nation we sent troops to the Persian Gulf to rescue Kuwait from Saddem Hussein. In March 1991 we gasped at the harsh evidence of videotape of Los Angeles police officers "ganging-up on" unarmed motorist Rodney King. Such abuse of power is troubling to every American. It is dangerous to American democracy and threatens the freedoms we prize so highly. When the little guy is a teenage journalist and the oppression teaches the distorted message that the pen can be silenced when it calls those in authority to task, the future of free expression and democracy is imperiled.

Hazelwood Revisited

When the Hazelwood versus Kuhlmeier decision was handed down in January 1988,[1] we saw the national application of this trend of unwarranted power being misapplied to scholastic journalism. It was a trend one of the authors had observed being fashioned in Pennsylvania in the 1970s.[2] In its Hazelwood decision, the United States Supreme Court gave high school principals what is popularly misperceived as nearly unlimited power to censor the scholastic press. In Hazelwood, the Court ruled the principal had the power to exorcise articles on pregnant teens and children of divorce as they appeared in a school-sponsored newspaper prepared for academic credit as part of a journalism class. The Court concluded the principal's concern for student privacy, the exposure of younger students to unsuitable sexual material and deadline pressure constituted actions "reasonably related to legitimate pedagogical concerns." Key to the Hazelwood decision was the Court's view that this particular student newspaper was so closely tied to the school, as a classroom exercise and a part of the school curriculum, as to give the principal publisher-like status and the freedom to conform the newspaper's message to the school's doctrinal mission. The Court, in a footnote, recognizes a distinction between speech that is school-sponsored and speech that is not. Freedom-seeking student editors might be well advised to distance their publications from the school district by creating a student-sponsored newspaper. Such a major undertaking, the authors recognize, is unlikely given the student editors other responsibilities for grades, college admission and a teenage social life. Since Hazelwood, one of the authors (and many others) has been warning teachers and scholastic journalists at conventions and workshops of the dangers of that decision, and he has been thankful that students and teachers in Pennsylvania were safe from its impact.

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[1] Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562, 484 U.S. 260 (1988).

[2] Stephen G-M. Shenton and Pamela Murray Cowell, "Regulating the Scholastic Press: The Pennsylvania Example," Paper presented to the Secondary Education Division, Association for Education in Journalism and Mass Communication, Baton Rouge, Louisiana, January 1984.

Pennsylvania Regulation of Freedom of Expression

Since 1978, the scholastic press in Pennsylvania has been protected by Pennsylvania Department of Education regulations concerning freedom of expression.[3] Those regulations are anchored in the Tinker decision[4] which permitted student expression to be limited only when necessary to preserve the school's educational environment. As such, the Pennsylvania regulations provide greater protection for student expression than found by the Hazelwood Court in the First Amendment. The regulations give student journalists the same freedom as professional journalists[5] with four exceptions:

> (b) Students have the right to express themselves unless the expression materially and substantially interferes with the education process, threatens immediate harm to the welfare of the school or community, encourages unlawful activity or interferes with another individual's rights.[6]

Given the legal effect of such regulations, Pennsylvania students have greater freedom than a solitary reading of Hazelwood would suggest. Indeed, civil libertarians, faced with a conservative Supreme Court, are mining more expansive liberty from state constitutions.[7] The U.S. Supreme Court sanctioned just such an approach in a California case which permitted, by state constitution, leafletting in a privately-owned mall.[8]

Article 1, Section 7, of the Pennsylvania Constitution provides in part: The printing press shall be free to every person[9] who may undertake to examine . . . any branch of government, and no law shall ever be made to restrain the right thereof." The Pennsylvania Supreme Court, when considering leafletting on a private college campus found it's own constitution provided greater freedom of speech than the federal First Amendment: "A state may provide through its Constitution a basis for the rights and liberties of its citizens independent of that provided by the Federal Constitution and the rights so guaranteed may be more expansive than their federal counterparts."[10]

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[3] Commonwealth of Pennsylvania, Pennsylvania Code, Title 22, Education, Section 12.9, "Freedom of Expression," (Mechanicsburg, PA: Fry Communications, Inc., February 1991).

[4] Tinker v. Des Moines Community School District, 393 U.S. 503 (1969).

[5] 22 Pennsylvania Code, 12-10, (g) (1).

[6] 22 Pennsylvania Code, Section 12.9. The regulations also state that "School officials shall supervise student newspapers published with school equipment, remove obscene or libelous material and edit other material that would cause a substantial disruption or interference with school activities.

[7] "In the Fly of the Beholder," National Law Journal, June 17, 1991, discusses a suit against the superintendent of Clearview [New Jersey] Regional Junior High School who "violated the student's rights [of free expression] under the state constitution.

[8] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035 (1980). See generally, Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harvard Law Review, 489.

Hazelwood in Action in Pennsylvania

The problem with principals interpreting Hazelwood surfaced (again)[11] on Thursday, March 14, 1991, when one author received a telephone call from the President of the Pennsylvania School Press Association. At 10:15 p.m., the chief officer of this leading independent association described in guarded terms what one wishes to call the Hazelwood scenario. The principal of her high school,[12] had repeatedly questioned a student who had written an allegory critical of the principal's public actions during an assembly. The principal had said that the newspaper may not print the allegory as it was originally written. [13] Steve Shenton advised Mrs. Jane Blystone that no principal in Pennsylvania may use the power of the Hazelwood decision to censor a scholastic publication since Pennsylvania school law prohibits such censorship except for the reasons listed above. Indeed, Section 12.9 of the Pennsylvania Code specifically prohibits censorship: "(3) School officials may not censor or restrict material simply because it is critical of the school or its administration." For the lay reader, the effect of the Pennsylvania regulations post-Hazelwood may be unclear. The confusion in Pennsylvania schools is compounded by Pennsylvania School Law, a reference manual used by many principals which details the empowering language of Hazelwood but virtually ignores the limitations presented by the Pennsylvania regulations specific references to the Tinker Test.

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[9] Emphasis added.

[10] Commonwealth v. Tate, 432 A.2d 1382, (1981).

[11] No one knows how many of these crises have occurred in Pennsylvania since the Hazelwood decision was handed down.

[12] The names of the persons involved in this incident have not been used at the request of the teacher and student involved.

[13] The principal was censoring the article under the power provided him by the Hazelwood decision, although he did not explain this to the student involved. This faulty interpretation of the applicability of the Hazelwood decision could easily be drawn from Francis and Rutter, Pennsylvania School Law, (Banks-Baldwin Law Publishing Co., 1988), T 105.11, "the complete guide to law and fiscal procedure for Pennsylvania Educators and their legal counsel" notes: "The [US Supreme] court held that in activities that are part of the school curriculum and might seem to carry its sanction, officials may bar dissemination of student statements about drugs, sexual activity, pregnancy, birth control, contested political issues and **other matters** when doing so would serve any valid education purpose." Bold face added.

We provided Mrs. Jane Blystone with copies of the interpretation of Hazelwood principals may find in the Pennsylvania School Law reference; and we sent her a copy of the most recent Pennsylvania Department of Education regulations concerning freedom of expression, 22 Pennsylvania Code, Section 12.9. Mrs. Blystone was supposed to advise us of the continuing developments in her situation. Instead, she broke off the discussion for more than a week. When we reached her again, she advised us that the student who wrote the allegory revised it three times under the direction of the principal. The student finally decided not to publish the third revision. Instead, the student published a short editorial. The balance of the space that was intended to carry the allegory was left blank in protest of the censoring of the student's writing.

The student involved in this tragic scenario is the most likely plaintiff, but she does not want to sue her principal. She is afraid to undertake a suit. The faculty adviser's standing to sue is less clear. Fellow students and their parents might sue on the legal theory that the principal denied them their right to receive information, a right recognized by a plurality of the U.S. Supreme Court as it considered the banning of books in a school library.[14] All three suits seem unlikely at the present time, and as a result, the teacher, the student editor and her readers rights have been abridged without protest. At the very least, the cloud of Hazelwood has wrongfully chilled freedom of inquiry and discussion in one high school in Pennsylvania. But we argue that a great deal more is going on here.

Analysis of Hazelwood

At least two writers wish us to understand that the Hazelwood decision did not appear out of nowhere. The groundwork for the decision was prepared gradually by both the Burger and Rehnquist courts.[15] Louis Day and John Butler also suggest that the deeper significance of Hazelwood is a struggle between two educational ideologies, the cultural transmission of shared values (a brand of formalism) and the progressive interest in the individual's need for self-expression and growth. Indeed, they remind us that in Bethel School District No. 403 v. Frazer, the U.S. Supreme Court in 1986 reaffirmed the importance of the cultural value ideology when a Burger opinion upheld disciplinary action against a high school student, Matthew Frazer, for using an explicit sexual reference in a speech to a student assembly. This case marks the Court's renewed emphasis on the cultural transmission ideology and perhaps the end of the Warren court's attempt to promote the progressive ideology.[16] It is beyond the scope of this paper to review and to comment point by point upon Day and Butler's well argued discussion. Instead, it may be sufficient to say that they agree with the finding in Hazelwood that the schools have an indoctrinative imperative which they later call "The Pedagogical Imperative," and they offer a plan for (reestablishing) control of the scholastic press. They express their sympathy with Hazelwood in their concluding remarks:

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[14] Board of Education Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799 (1982).

[15] Louis A. Day and John M. Butler, "Hazelwood School District v. Kuhlmeier: A Constitutional Retreat or Sound Public Policy?" Paper presented to the Secondary Education Division, Association for Education in Journalism and Mass Communication, Portland, Oregon, July 1988.

> In summary, when viewed in the broad context of constitutional law Hazelwood is not a significant retreat. It is predicated upon reasonable philosophical and educational theories and principles of sound public policy. It is time to disavow the alarmist attitudes represented by such publications as Captive Voices and to return to a rule of reason within the public academy.[17]

In a second paper, "The Teaching of Ethics and Moral Reasoning in Scholastic Journalism: The Pedagogical Imperative," Day and Butler suggest:

> The Hazelwood decision will hopefully foster renewed interest in the teaching of ethics in the high school journalism curriculum. . . . Since many practicing journalists receive their first formal training on the high school newspaper, it is imperative that their education be well grounded in the ethical standards of the profession[18]. . . . The teaching of journalistic values, whereby students are the passive receptors of knowledge, is a necessary but insufficient condition of ethics training. Students need to be more actively involved in this values-oriented education, and the pedagogical tool through which this can be accomplished is the case study simulation method based upon sound principles of moral reasoning.[19]

We feel Day and Butler's goals in proposing explicit ethical instruction in the public school are valuable and are consistent with our growing understanding of andragogy, the art and science of learning. But we feel their proposal glosses over values inherent in the work and philosophies of pragmatists such as John Dewey, values which are implicit in the progressive educational ideology embodied in Tinker, an ideology Day and Butler seem to see as dysfunctional. To put it another way, we do not see how one can praise Hazelwood as valuable because it displaces the progressive educational ideology Dewey championed, on the one hand, and then use Dewey's ideas to support establishment of a controlled educational ideology based on the school as the center of the cultural universe. Offering such an argument under an authoritarian label such as the "Pedagogical Imperative" ignores the fundamental philosophical point that was the basis for founding American Pragmatism and for revolutionizing Philosophy. How, that is, does one help a student achieve and understand the benefits of free expression by withdrawing freedom of expression?

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[16] "Education and the Court: The Supreme Court's Educational Ideology," 40 Vanderbilt Law Review 971, (May 1987).

[17] Day and Butler, Hazelwood, 40.

[18] Standards the student editors in Hazelwood followed and which were found deficient by the Rehnquist majority.

[19] Louis A. Day and John M. Butler, "The Teaching of Ethics and Moral Reasoning in Scholastic Journalism: The Pedagogical Imperative," Paper presented to the Secondary Education Division of the Association for Education in Journalism and Mass Communication, St. Petersburg, Florida, January 1989.

We argue that a careful reading of Dewey and other American Pragmatists will reveal that they were motivated by what Shenton has named "The Pragmatic Imperative."[20] By that he means the idea that "problems must be solved promptly."[21] In the process of solving problems or dealing with dilemmas that real situations such as reporting a story for a real school newspaper present, a student learns the values that are important in his culture: truthfulness, fairness, balance, love, empathy, to name several; and the values the student learns are drawn deductively from the experience of reporting and publishing the story and of experiencing its impact on real people.[22] This problem solving process is the strength and implicit core of the school publication or scholastic journalism process.

The values Day and Butler propose to teach in an organized media ethics unit or curriculum are being fostered directly[23] by advisers[24] who are working with school newspapers or publications in schools that do not have a journalism curriculum. They may be fostered more systematically in a media ethics instructional unit or class in the school that does have a journalism curriculum. But that is no reason to allow Hazelwood to drive the ad hoc experimentation with ethical values under cover or out of existence because school administrators or judges do not understand the implicit but highly sophisticated and very realistic process of ethical reasoning that already is operating. Indeed, Day and Butler understand the need for this dynamic process, for what Dewey called action or experience:

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[20] This copyrighted term is drawn from Stephen G-M. Shenton, "Ralph Nader, Public Interest Journalism, and Interest Group Liberalism" (Ph.D. dissertation, U. of Illinois, 1991).

[21] Shenton argues that The Pragmatic Imperative is an ethical concept that is deeper than Kant's Categorical Imperative.

[22] We do not find in Day and Butler any consideration of the relationship between allowing a person to learn and self esteem, especially the confidence needed to undertake both inquiry and communication.

[23] Surely the journalism teacher or adviser is only one source of the values a student needs to learn and does learn.

[24] Many advisers in Pennsylvania and in the northeast are not certified in journalism or in scholastic journalism. Indeed, many do not teach English or journalism. They teach shop or printing or biology or other subjects.

> The naturalistic theories of both Aristotle and John Dewey support the notion that moral learning and development comes through doing and habitual exercise. In other words, moral reasoning judgments are *necessary* for moral action **but are not** *sufficient* for moral action. Moral judgments must be put into action for them to become a part of the student's value system. Thus, the teaching of moral philosophy (ethics) in scholastic journalism should not [must not] be viewed as one distinct unit of instruction but should permeate the entire curriculum and should proceed in a systematic fashion from the teaching of basic journalism knowledge at the outset to practical training (i.e., experience) in moral reasoning in the more advanced stages.[25]

Given this realization by Day and Butler, we are puzzled by their earlier conclusion that Hazelwood is a reasonable decision that restores order to education. For what Dewey meant by his concern with experience was precisely the idea that a student learns only what he creates and that without such a creative opportunity, without a newspaper or a publication involving the creation of words,[26] education in its deepest and most exciting and most rewarding sense does not, indeed, cannot occur. Such a realization is not Dewey's alone, of course. Albert Einstein put the matter of his need for freedom somewhat differently in his reaction to the standard authority driven education he found in colleges and universities:[27]

> One had to cram all this stuff into one's mind, whether one liked it or not. This coercion had such a deterring effect that, after I had passed the final examination, I found the consideration of any scientific problems distasteful to me for an entire year . . . . It is in fact nothing short of a miracle that the modern methods of instruction have not yet entirely strangled the holy curiosity of inquiry; for this delicate little plant, aside from stimulation, stands mainly in need of freedom; without this it goes to wrack and ruin without fail. It is a very grave mistake to think that the enjoyment of seeing and searching can be promoted by means of coercion and a sense of duty. To the contrary, I believe that it would be possible to rob even a healthy beast of prey of its voraciousness, if it were possible, with the aid of a whip, to force the beast to devour continuously, even when not hungry--especially if the food, handed out under such coercion, were to be selected accordingly.[28]

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[25] Day and Butler, "Teaching," 16. [The remark in brackets is our clarification. We have emphasized three words in bold face type].

[26] Words, symbols, permit the reflection or brooding that turn an occurrence into an experience from which something can be learned. No one else can reflect for a student except the student.

[27] The presence of multiple choice, true and false testing in all too many schools is likely more harmful than the Hazelwood decision, but the race is a close one.

[28] Albert Einstein, *Examining in Harvard College*, quoted in Paul Goodman, *Compulsory Mis-education and The Community of Scholars* (New York: Vintage, 1962), 5. Statistics concerning the failure of modern pedagogy are everywhere. In a recent speech, Tony Brown told an audience at Shippensburg University that the dropout rate [among blacks] in New York City high schools is 70 per cent.

When a principal or a school official is unconditionally empowered to review newspaper or scholastic publication content at any time he or she wishes, when a principal is encouraged to interfere in the experience of any student for any reason that principal feels sufficient, education as Dewey understood it has been prevented unconditionally. Since what Dewey understood about the relationship between learning, personal moral growth, and the conduct of society is not clear, a review of some of his more important ideas here will clarify his position. More important, the review that follows will address a key error that is not addressed in discussions of the role of mass communication and scholastic journalism in America.

Logic of Inquiry

As odd as it may sound today, the pragmatists major battle in philosophy concerned the application of scientific, experimental methods to social or human as distinct from physical science. Dewey wrote tirelessly about the need to apply an expanded scientific method to social questions and problems. His concern was apparent in the title to his major book on science, Logic, The Theory of Inquiry. The essence of the social versus physical debate in philosophy was (1) whether laws were out there somewhere to be discovered mentally in reflection, or (2) whether answers or solutions to problems not laws were to be found in experience, to be found in the work, in the inquiry and reflection needed to solve daily problems. The crux of this debate that is cogent for this paper is well stated in Dewey's discussion of social inquiry.

As Dewey learned it, the nature of inquiry, of how we think and how we can use what we learn, it is quite simple. "Inquiry is the controlled or directed transformation of an indeterminate situation" or "problematic situation" "into one that is so determinate in its constituent distinctions and relations as to convert the elements of the original situation into a unified whole."[29] An "indeterminate situation" is one in which its constituents do not "hang together" or make sense. Whereas, a "determinate situation" is "closed" or "finished" and can be said to be a "universe of experience," an inquiry is "controlled or directed" when "the operations involved in it actually do terminate in the establishment of an objectively unified existential situation."

An inquiry begins when an indeterminate situation requiring inquiry is recognized. A student receives an assignment to write a story for a school newspaper. Inquiry continues as the problem that has been identified as unsettled is transformed from a "problematic situation into a determinate situation."[30] "To find out what the problem [or] problems are which a problematic situation presents to be inquired into, is to be well along in inquiry." A student accomplishes this settling of a problem in observation of conditions that "taken together constitute the facts of the case."[31] Key facts omitted from previous discussions of inquiry are to be found in past experience, in what is otherwise called history.

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[29] John Dewey, Logic, The Theory of Inquiry (New York: Holt, Rinehart and Winston, 1938), 105, 107 [emphasis eliminated].

[30] Dewey, Logic, 108.

The next part of Dewey's explanation is so crucial to communications that we will quote it in its entirety.

> A possible relevant solution is then suggested by the determination of factual conditions which are secured by observation. The possible solution presents itself, therefore, as an idea, just as the terms of the problem (which are facts) are instituted by observation. Ideas are anticipated consequences (forecasts) of what will happen when certain operations are executed under and with respect to observed conditions. Observation of facts and suggested meanings or ideas arise and develop in correspondence with each other. The more the facts of the case come to light in consequence of being subjected to observation, the clearer and more pertinent become the conceptions of the way the problem constituted by these facts is to be dealt with . . . .. The clearer the idea, the more definite, as a truism, become the operations of observation and of execution that must be performed in order to resolve the situation.[32]

The discussion that follows forms the basis of the best and most powerful work in communications. Focus on the incredible power of Dewey's discussion for communications.

> An idea is first of all an anticipation of something that may happen; it marks a possibility. When it is said, as it sometimes is, that science is prediction, the anticipation that constitutes every idea an idea is grounded in a set of controlled observations and of regulated conceptual ways of interpreting them. Because inquiry is a progressive determination of a problem and its possible solution, ideas differ in grade according to the stage of inquiry reached. At first, save in highly familiar matters, they are vague. They occur at first simply as suggestions; suggestions just spring up, flash upon us, occur to us. They may then become stimuli to direct an overt activity but they have as yet no logical status. Every idea originates as a suggestion, but not every suggestion is an idea. The suggestion becomes an idea when it is examined with reference to its functional fitness; its capacity as a means of resolving the given situation.[33]

As we understand the Hazelwood decision, it precludes the formative stages of inquiry and reasoning that Dewey described above and he and the pragmatists understood as absolutely essential to personal moral and intellectual growth. Ironically, Day and Butler note Justice Frankfurter's concurring opinion in Wieman v. Updegraff that emphasizes the importance of freedom and experimentation in inquiry: "It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion."[34] But they argue that the Hazelwood test as Justice White offered it in the Hazelwood opinion is the more appropriate model:

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[31] Dewey, Logic, 109.

[32] Dewey, Logic, 109.

[33] Dewey, Logic, 109-110.

> A school must be able to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics. . . .otherwise, the schools would be unduly constrained from fulfilling their role as" a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[sic][35]

In making this assumption, Day and Butler make a significant error in judgment concerning the nature of the educational process. On the one hand they overlook Dewey's identification of the key ingredient in the development of a student's character or in what is known as a person's social self.[36]

> This examination takes the form of reasoning, as a result of which we are able to appraise better than we were at the outset, the pertinency and weight of the meaning now entertained with respect to its functional capacity. But the final test of its possession of these properties is determined when it actually functions--that is, when it is put into operation so as to institute by means of observations facts not previously observed, and is used to organize them with other facts into a coherent whole.
>
> Because suggestions and ideas are of that which is not present in given existence, the meanings which they involve must be embodied in some symbol. Without some kind of symbol [there is] no idea; a meaning that is completely disembodied cannot be entertained or used. Since an existence (which _is_ an existence) is the support and vehicle of a meaning and is a symbol instead of a merely physical existence only in this respect, embodied meanings or ideas are capable of objective survey and development. To look at an idea is not a mere literary figure of speech.
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> Suggestions have received scant courtesy in logical theory. It is true that when they just pop into our heads, because of the workings of the psycho-physical organism, they are not logical. But they are both the conditions and the primary stuff of logical ideas.[37]

It was in Kant that Dewey found the profound insight that affected his logic. He noted in Kant's words "that apart from each other perceptions are blind and conceptions empty."[38] Despite the misinterpretations of Kant's profound insight, Dewey notes,

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[34] _Wieman v. Updegraff_, 344 U.S. 196 (1952). Emphases added.

[35] 14 Med.L.Rptr. 2087 (1988) quoted in Day and Butler, _Hazelwood_, 27.

[36] John Dewey and James H. Tufts, _Ethics_ (New York: Henry Holt, 1936), 315: Dewey writes "The self should be _wise_ or prudent, looking to an inclusive satisfaction and hence subordinating the satisfaction of an immediately urgent single appetite; it should be _faithful_ in acknowledgment of the claims involved in its relations with others; it should be solicitous, _thoughtful_, in the award of praise or blame, use of approbation and disapprobation, and, finally, should be _conscientious_ and have the active will to discover new values and to revise former notions.

[37] Dewey, _Logic_, 110.

> Perceptual and conceptual materials are instituted in functional correlativity with each other, in such a manner that the former locates and describes the problem while the latter represents a possible method of solution. Both are determinations in and by inquiry of the original problematic situation whose pervasive quality controls their institution and their contents. Both are finally checked by their capacity to work together to introduce a resolved unified situation. As distinctions they represent logical divisions of labor.[39]

To understand Dewey, we must point out that a student cannot reach the level of reasoning he is capable of reaching by using the perceptions of another person. Whenever another person interferes in a student's reasoning process that process is interrupted or terminated. That is exactly what Hazelwood provides for, however, interference by an adult applying the highest adult standards to a student's individual growth. But most students may not be able to work to those standards initially. That means that the process of inquiry and communication is being limited to the best students. Or put the other way, it means the majority of our students are being deprived by common law of their right to engage in inquiry and communication according to their individual abilities.

The key to what Shenton calls adequate "Normative Experimental Inquiry" is what Dewey refers to as reasoning: "The necessity of [each person or student] developing the meaning-contents of ideas in their relations to one another." Inquiry continues, Dewey notes, until a "suggested meaning is immediately accepted." When that occurs, inquiry "is cut short." Premature termination of inquiry is undesirable because it results in ungrounded inquiry. "An idea or suggestion that is not developed in terms of the constellation of meanings to which it belongs can lead only to overt response," which terminates inquiry. Put at some length, an idea or proposition which is a hypothesis when "once suggested and entertained" must be

> Developed in relation to other conceptual structures until it receives a form in which it can instigate and direct an experiment that will disclose precisely those conditions which have the maximum possible force in determining whether the hypothesis should be accepted or rejected. Or it may be that the experiment will indicate what modifications are required in the hypothesis so that it may be applicable, i.e., suited to interpret and organize the facts of the case. In many familiar situations, the meaning that is most relevant has been settled because of the eventuations of experiments in prior cases so that it is applicable almost immediately upon its occurrence.[40]

In the serial or progressive process of inquiry, facts and ideas are operationalized. Facts are used to test ideas "that represent possible solutions" each of which must be "tested or proved."[41] In practice, this testing or operationalization is far from simple. Common sense and scientific inquiry, the customary and the ideal, compete. This competition is made complex by the different language and assumptions peculiar to each camp or pursuit; but the end sought,

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[38] Dewey, Logic, 111.

[39] Dewey, Logic, 111.

[40] Dewey, Logic, 112.

> The generality of _all_ subject-matter as such means that it is freed from restriction to conditions which present themselves at particular times and places. Their reference is to _any_ set of time and place conditions--a statement which is not to be confused with the doctrine that they have no reference to actual existential occasions. Reference to time-place of existence fulfills the general relations laid down in and by the constitution of the scientific object.[42]

Our brief review of the process of inquiry neither defends nor completes Dewey's position. Instead, we have attempted to sketch key considerations so they may be related to the discussion here. Turning to twin goals Dewey pursued allows us to suggest the implications of our discussion. A student is not born an individual. He or she is born a person who must achieve individuality. The individuality he must achieve must be sufficient to allow him to understand and solve the expanding myriad of problems that now confront and will probably always confront society and democracy. Since this is so, Dewey also inquired what education was and how it should work if the individuality one requires is to be learned. He published _Democracy and Education_ in 1916, although he wrote on the subject during his entire professional life. It is sufficient to say, one must learn continuously to be an individual who is capable of living empathically while he earns a living and simultaneously works to solve the personal and societal problems that occur continuously, that nature and life place on his and society's agendas. As one learns to be an individual and as he learns how to solve problems, he must contribute that talent and that knowledge to society if our democracy is to function and is to continue. In that sense, each of us must be social. How we do so is addressed but not solved in the second significant part of Dewey's work which centers upon communication and its role in society.

Communication and The Public

In Lary Belman's analysis of _The Idea of Communication in the Social Thought of the Chicago School_[43], he notes the conditions Dewey maintained were necessary for "the inchoate public now extant" to "function democratically."[44] As Belman puts it,

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[41] Dewey, _Logic_, 114.

[42] Dewey, _Logic_, 117.

[43] Sheldon Lary Belman, "The Idea of Communication in the Social Thought of the Chicago School" (Ph.D. dissertation, University of Illinois at Urbana-Champaign, 1975).

> Dewey postulated; the presence of (1) a vigorous, systematic, and continuous social inquiry to reveal the influential agencies at work in society and their mode of operation, and (2) a widespread and rapid distribution [communication] of the findings of this inquiry in a form readily understood by those for whom these findings have significance.[45]

Dewey's stress on the public and its connection to communication and the Great Community was evident in The Public and Its Problems, his response in 1927 to Walter Lippman's Public Opinion, which was published in 1922, and to The Phantom Public, which was published in 1925.[46] Dewey suggested a public comes into being when the indirect consequences of transactions between single persons and groups are important, when the effects of those transactions go beyond those immediately engaged and affect others. When the U.S. Supreme Court tells us in Hazelwood that the communication that may take place in scholastic publications is not the same as the communication that occurs in a public forum, they are telling us to teach students a bastardized version of communication. In addition, they force us to fail to teach students how communication must work if it is to result in the formation of the public opinion that is the only force capable of monitoring and correcting errors in our complex democracy.

As Dewey put it, when a nation such as America expands its population beyond villages and small towns and when that population increases and the needs of that population for work, and food, and entertainment increase and increase again, then the negotiations between one person and a second can no longer be monitored or assisted by a traditional community; but those negotiations still have precedent setting effects on the negotiations among all persons, and those negotiations still warrant monitoring and directing or controlling. Persons not directly affected immediately by those negotiations are joined symbolically with all other persons who might be affected. They are joined in a community of interest or a community of the mind that Dewey called a public. This line of thinking makes sense if the reader is sympathetic to Dewey's underlying supposition that moral or normative considerations and behavior are the logical objectives of every individual, of every student. That is, there is no inherent social structure or plan that dictates the concerns of persons, that excludes me from addressing or solving any problem that affects my life or the lives of others. And students must not be taught that communication is a matter of preparing only those messages that are acceptable to some authority figure. Only culture or what some call past practice inhibits the universal application of the pragmatic imperative that has long been a feature of Christian theology.

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[44] John Dewey The Public and Its Problems (Athens, OH.: Swallow Press, 1957), 147.

[45] Belman, "Idea of Communication," 92.

[46] Walter Lippmann, Public Opinion (New York: MacMillan, 1922). Walter Lippmann, The Phantom Public (New York: Harcourt, Brace, 1925).

Dewey believed democracy was synonymous with associated living. That is, democracy is not just an idea, not only a word or a representation of reality.[47] It is reality, one that exists or may be created by empathetic persons in "conjoint communicated experience."[48] One is empathetic or achieves empathy by use of language, Dewey felt. Language allows one to reflect upon and to predict the consequences of relations and to act humanely on the basis of those reflections. Dewey's ideas of community and of a public are united, Belman suggests, by common characteristics:

> Each requires for its existence: (1) a fostering of social awareness through unhindered [but empathetic and reflective] communication, (2) a resulting recognition of common interests, and (3) based upon these common interests, a shared and active control over the encouragement or suppression of events, the efficacy of this control deriving out of an awareness of social causes. They differ in that a community is primarily composed of a collectivity of face-to-face associations whereas a public is formulated on the basis of common interest rather than contiguity. A public, in other words, like a community, comes into being when individuals are united by their common, overt desire to regulate certain activities. These individuals, however, need not live close to one another as long as through communication they can act jointly on the basis of their shared concerns.[49]

It is unnecessary to explore Dewey further here. But it is well to emphasize one point on which all the pragmatists beginning with Oliver Wendell Holmes, Jr. agreed. When Darwin's work on scientific method was used as a basis for revolutionizing philosophy, the philosopher who undertook the work fought against what is called the spectator theory in philosophy. What traditional philosophers often did was to separate their examples or pet theories from life and to study those examples or theories. Those philosophers then would try to make life perform as they felt their theories said it should. Dewey and the pragmatists argued that such an approach was bound to fail for two reasons. First, no human being is capable of knowing all things. Men are not Gods. Consequently, no grand theory in which all things are explained is possible. Dealing with someone's pet theories, or examples, or case study simulations may be helpful in introducing a student to a recommended method of studying and solving a problem or answering an ethical question. But life is not a case study. Therefore, students must learn to think and act spontaneously on their own in novel situations they will encounter daily, situations such as those students encounter in working with a scholastic newspaper or publication. Secondly, Dewey and others argued devoting great energy and time to study of metaphysical rather than human problems diverted those resources to enterprises that were impossible to achieve and therefore were destined to fail. When Dewey and the pragmatists argued that human beings must turn their attention to existential problems, to the problems we encounter in living, he was asking us to use our greatest resources, the minds of our smartest and best educated persons, to help solve the myriad of problems that constitute modern life. A key problem Dewey recognized was the responsibility of the persons he called The Public to help other persons learn. While he did not name the responsibility of helping others learn, it is useful to call such a responsibility "The Public Responsibility," as Shenton has done. The Public Responsibility to teach, to recreate The Public, is driven by what Shenton wishes to name "The Andragogical Imperative." These ideas are part of a larger body of work that Shenton has named "The Public Responsibility Philosophy of Communication." While it is beyond the scope of the present paper to explore that philosophy, it is well to touch on one additional line of inquiry.

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[47] William James distinguished between thoughts and things in 1911. "Things are known to us by our senses, and are called presentations by some authors, to distinguish them from ideas or representations which we may have when our senses are closed. From Problems in Philosophy, Chap. 4, reprinted in Walter G. Muelder and Laurence Sears, eds., The Development of American Philosophy (Boston: Houghton Mifflin, 1940), 359.

[48] Dewey, Public and Its Problems, 148.

[49] Belman, "Idea of Communication," 82-83.

Myth of Power

Why education believes it can escape the lessons that have been learned thus far by others is a mystery. Critics of the delegation of government power have long observed that failure to recognize the myth of power is the more serious error. As Walter Lippmann put it in his important book, The Good Society:

> Truly conceived, a democracy is not the government of a people by elected representatives exercising the prerogatives of their former lords and masters. It is the government of the people by a common law which defines the reciprocal rights and duties of persons. This common law is defined, applied, and amended by the representatives of the people.[50]

Lippmann was arguing that "the people cannot govern by entrusting their representatives with the prerogatives of a king." A principal or any other administrator who has unlimited power delegated to him must not act arbitrarily like a king, that is. Whoever occupies an administrative position charged with supervision of the publication of scholastic newspapers must understand

> How a democracy can govern itself; when they have realized that [they] cannot govern by issuing commands; that [they] can govern only by appointing representatives to adjudicate, enforce, and revise laws [sanctioned agreements reached through inquiry and communication] which declare the rights, duties, privileges, and immunities of persons, associations, communities, and the officials themselves, each in respect to the others.
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> This is the constitution of a free state.[51]

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[50] Walter Lippmann, An Inquiry into the Principles of The Good Society (Boston: Little, Brown, 1937), 266.

[51] Lippmann, Good Society, 267.

The inevitable confusion that afflicted democratic philosophers in the nineteenth century about "the indispensable corollary of a representative government" being "a particular mode of governing," the application, that is, of a particular theory that embodied the notion that it was omnipotent, stimulated a conflict between defenders of the law and the guardians of liberty, "between social control and individual freedom." Despite his unwieldy terminology, Lippmann had the idea right: "Thus in a free society the state does not administer the affairs of men [an impossible feat, at best, but one that is being undertaken more vigorously by virtue of the Hazelwood decision]. It administers justice among men who conduct their own affairs."[52] The certainty in pro Hazelwood positions that a particular position or theory and related practice is being imposed or taught will not guarantee that that position or theory is being or can be learned.

We should continue to give students the freedom to learn how to interact with others in the free environment of scholastic media so they will learn how to conduct their own affairs as students and later as adults, as has been the case for a generation. Thus, "The manifest destiny of mankind . . . to become adult and to replace paternal authority with fraternal association"[53] can only be accomplished when men are equals or when they have equal rights. And those rights must be held in place or modified by agreement among equals based upon examination in "Normative Experimental Inquiry"[54] of the facts of the case and by discussion, by common law in the worst case scenario or by ethical debate in the ideal case. Even more important, those agreements must be changed continuously as inquiry reveals the need for such change. The dynamism implicit in Normative Ethics is not agreement on a particular ethical formula. Rather it is agreement on the best way to solve a particular problem that enables intelligent moral action to be taken so that changes that need to be made are made.

Nineteenth century liberalism came to a dead end where it chose to reestablish two realms, a real, changing, booming, buzzing world in which we live and adjust and compromise through inquiry and communication, and a fixed, rigid, formal world that is not subject to human definition and reorganization and reconstruction. Unfortunately Hazelwood raises the same dilemma. The Rehnquist Court believes it has had the last word on the matter of freedom of expression in our schools and that we must accept their answer that students everywhere must relinquish their freedom to grow, their opportunity to become equal, to one adult administrator who may determine as he or she chooses what is valuable, or appropriate, or interesting. The position of the Rehnquist Court flies in the face of the fact that in the broadest sense "the earth . . . and all things therein are the general property of all mankind, exclusive of other beings."[55] The fallacy of an untouchable authority revisited in the principal presents the essential conflict that legal theorists resolved in a distributive theory of justice as the only logical answer, an answer Lippmann attempted to formulate intelligibly enough so that it might be implemented.

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[52] Lippmann, Good Society, 267.

[53] Lippmann, Good Society, 268.

[54] Shenton, "Ralph Nader, Public Interest Journalism, and Interest Group Liberalism."

> No individual can or should exercise sole and despotic dominion over any portion of the earth or the things therein. The earth is limited in size and its use is necessary to every man's existence. Therefore the rights of any man upon the earth must be reconciled with the equal rights of other men, not only of living men but of unborn generations.[56]

If one wishes to argue for or against Dewey and the pragmatist position, he must get to the heart of the matter, which is admittedly difficult since Dewey's writings alone piled together stood more than twelve feet high. Doing so makes clear that scholastic journalism is a political enterprise, one intimately tied to the growth and well being of the democracy. We are not simply teaching English; and we should not be following the commercial press as our example of excellent performance, since much commercial journalism is poor and rude. Moreover, our mission is not to prepare young people for careers as journalists. Our mission is to educate as liberally as our abilities allow Americans who may become journalists. Dewey's discussion may be too deep for scholastic journalists, but it certainly is appropriate for those who teach teachers of scholastic journalism or advisers of scholastic media.[57]

Day and Butler argue that a national standard set in Washington by the U.S. Supreme Court, one such as Tinker, may be inappropriate for scholastic journalism. We agree. An overbroad and vague national standard such as Hazelwood does, indeed, impinge on those states that have no regulations concerning scholastic journalism; and it encourages infringement on students in states such as Pennsylvania where our freedom of expression regulations can be ignored because of the overbroad power exercised by a principal who misinterpreted and misapplied that national standard, leading not to the growth of American Mind[58] but to a fearful scenario in which students and at least one faculty member are being cowed by an administrator who seems to know little about ethics or freedom of expression. We argue, then, that the Hazelwood decision is not well grounded and that it should be reconsidered in subsequent decisions by the U.S. Supreme Court and by state courts and made as specific as the Pennsylvania regulations. In the process, the debate about regulations and ethics may ultimately solve the dilemma posed by advisory scholastic journalism organizations that have been largely powerless to help students and faculty. While the debate rages, our schools graduate journalists unprepared to take up the mission of the profession and citizens incapable of self-governance.

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[55] Lippmann, Good Society, 276.

[56] Lippmann, Good Society, 276.

[57] Stephen G-M. Shenton and Anne Smith, "Scholastic Journalism Education: Benchmark 1982." Paper presented to the Secondary Education Division, Association for Education in Journalism and Mass Communication annual convention at Ohio University, August 1982.

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[58] Day and Butler quote Dewey's definition of mind as "that behavior or activity of the human organism in which a desired future is used to organize things." They draw their quotation from Lawrence Kohlberg and Rochelle Mayer, Harvard Education Review, Vol. 42, No. 4, November 1972, 453.

SLAPPs and the Suppression of Public Participation:
The Implications for the First Amendment and Public Relations

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ABSTRACT

Strategic Lawsuits Against Public Participation (SLAPPs) are a relatively new threat to the First Amendment. In effect, SLAPPs are used to silence opponents. The most common scenario is developers SLAPPing activist groups. The cases are rarely decided in favor of the plaintiff but the cases do succeed in tying up the opposition, silencing the opposition for a time, and intimidating would be opponents. This paper explains SLAPPs and the implications of SLAPPs for the First Amendment and the filed of public relations.

SLAPPs and the Suppression of Public Participation: The Implications for the First Amendment and Public Relations

A small group of farmers in Bakersfield, California supported a state proposition involving corporate farming. The group was sued by the J.G. Boswell Company, an agribusiness company. The League of Women Voters wrote two letters to a local newspaper criticizing a proposed condominium project. The League was sued for $63 million by the developers of the condominium project (Pell, 1989). Betty Blake and six others protested a developer's plan to cut down shade trees in their neighborhood. The seven are sued for $6.56 million by the developer (Turque, Wright, & Pomper, 1990). Although each case went to court, none result in awards for the plaintiffs.

These are but three of the over 250 cases of SLAPPS catalogued by University of Denver professors George Pring and Penelope Canan. SLAPPs is an acronym for Strategic Lawsuit Against Public Participation. SLAPPs usually involve individuals and advocacy groups which are sued for their involvement in political activity--for actions taken to address government officials or the electorate on matters of public interest (Canan & Pring, 1988a). SLAPPs serve to "chill" citizen participation. People are less likely to speak out on an issue if their actions result in a court appointment (Canan & Pring, 1988b; Pell, 1989). SLAPPs occur despite the fact that the suits violate an individual's First Amendment rights of political speech (Canan, 1989; Pring, 1989).

The growing use of SLAPPs should be a concern for all Americans and should hold a special concern for those in public relations. On a moral level, personnel in public relations should be appalled at such blatant attempts to suppress First Amendment rights. On a practical level, SLAPPs threaten a basic premise of public relations theory and the practice of issue management. Since SLAPPs can preclude one side of a debate from joining the discussion, the idea of two-way communication lauded in public relations theory is threatened by SLAPPs (e.g., Dozier, 1990; Pavlik, 1987). Moreover, much of the work in issue management is premised on groups becoming involved in the public policy making process (e.g., Heath, 1988; Heath & Nelson, 1986). Since SLAPPs can prevent groups from having a say in public policy decisions, SLAPPs are a threat to public relations as a whole and issue management in particular.

This paper is an effort to examine the use of SLAPPs and their relationship to public relations. The objective is both illuminative and didactic. It is illuminative in that the concept of SLAPPs is explicated and its threats to public relations articulated. It is didactic in that the paper is a call for public relations personnel to combat the use of SLAPPs. The pursuit of this dual-level objective is accomplished through the discussion of three areas. First, the concept of SLAPPs is developed in more detail. Second, the relationship between

SLAPPs, the First Amendment, and public relations is explored. Thirdly, the implications of points one and two are discussed.

SLAPPS: What Are They?

The concept of SLAPPs is relatively new. The term Strategic Lawsuit Against Public Participation did not appear in print until 1988. Canan and Pring's 1988 article in Social Problems is considered the seminal work on SLAPPs (Canan, 1991). In fact, little extant writings about SLAPPs exist. The body of work examining SLAPPs is dominated by Canan and Pring and the results from their Litigation Project at the University of Denver. Still the limited literature does provide some detail as to the characteristics of SLAPPs and the effects of SLAPPs.

SLAPP Characteristics

SLAPP filers usually fall into one of four categories: developers, landfill owners, manufacturers, or public officials. Developers are the largest filers of SLAPPs by far, followed by public officials. The typical SLAPP claim is $9 million and the average case takes 36 months to resolve (Canan & Pring, 1988a; Canan & Pring, 1988b). SLAPPs tend to be based on one of six common torts: (1) defamation (includes libel and slander); (2) business torts (includes interference with contract, business, and economic expectancy); (3) judicial torts (includes abuse of process and malicious prosecution); (4) conspiracy (joining with others to commit a tort); (5) nuisance; and (6) Constitutional or civil rights violations (includes due process, equal protection, and discrimination) (Canan & Pring, 1988b). Defamation is the most common ground for a SLAPP (53%) followed by business torts and nuisance (both at 32%). (The total percentage is greater than 100% because many cases involve multiple torts (Pring, 1989)).

The actions which trigger SLAPPs span a wide array of citizen actions designed to express opinions on public issues. A sample of the trigger actions include: circulating a petition, writing to a government official, calling a consumer protection agency for assistance, reporting police misconduct, speaking at a school board meeting about a "bad" teacher, and testifying against developers at a zoning hearing (Pring, 1989). At the risk of reification and vilification, SLAPPS tend to be a vehicle used by "corporate America" against citizen activism.

SLAPP Effects

Turque et al. (1990) claim most SLAPPs are based on "questionable grounds." The outcomes of SLAPP suits tend to support this characterization of SLAPPs since 80% of all SLAPPs fail because they are dismissed in court (Canan & Pring, 1988a; Pell, 1990; Pring, 1989). The extremely high failure rate suggests the true purpose of SLAPPs is not to win the libel or slander claims. Filers do not want to win the tort-based suits. Rather, the "apparent goal of SLAPPs is to stop citizens from exercising their political rights or to punish them for having done so" (Pring, 1989, pp. 5-6). Simply put, SLAPPs are a way to silence opposition. Furthermore, the failure rate does not mean SLAPPs fail to achieve their objective of silencing opponents.

SLAPPs do succeed in intimidating opponents and in derailing public discussion of issues. One way SLAPPs silence the opposition is by transforming a dispute from the public political arena to the private judicial arena. The target of the SLAPPs have moved the issue to the public arena by involving government. The idea is to increase public involvement and discussion of the issue (Canan, 1989; Canan, Satterfield, Larson, & Kretzman, 1990). The public debate is derailed as the public issue is transformed into a private concern--the issue is reprivatized (Canan & Pring, 1988a).

A second way SLAPPs silence the opposition is by "chilling" citizen participation. Even though filers lose the vast majority of SLAPs, targets still become intimidated and less likely to speak out (Canan & Pring, 1988). SLAPPs are a symbol that opponents will pay a price for public participation. That price is a multimillion dollar SLAPP that creates expenses, lost resources, and emotional stress (Canan, 1989; Pring, 1989). Moreover, the intimidation has a ripple effect in the community. When one person or group is sued, others shy away from public political participation. Such was the case in Squaw Valley, California where a SLAPP against one activist led other activist groups to shy away from protests against a condominium and golf course developer (Pell, 1990; Turque et al., 1990).

Ultimately, the SLAPPs result in a quieting of opposition. As one Oakland Attorney phrased it, "'The purpose is to shut environmentalists or other public-interest groups up'" (Turque et al., 1990, p. 22). Even though corporations do not win the suits, they do win in their efforts to silence the opposition. However, this silence is not without cost and that cost is the violation of First Amendment rights.

The First Amendment, SLAPPS, and Public Relations

The combination of the First Amendment, SLAPPs, and public relations makes for a very peculiar mix. The peculiarity is derived from the way in which SLAPPs violate the First Amendment and threaten public relations while remaining a corporate tactic in efforts designed to resolve the debate over public issues. This section is dedicated to identifying and elaborating this odd interrelationship.

The First Amendment: An Audience Interest Interpretation

When discussing the First Amendment, people often invoke the phrase "free speech." It is generally believed that the First Amendment is designed to protect peoples' right to express themselves. However, expression is only a part of the First Amendment with another part being the audience's right to receive information. The central purpose of the First Amendment is the protection of speech in order to enhance peoples' ability to make decisions (Stern, 1990). Free speech is necessary to maintain access to the public discourse people use when they make decisions--judge which of two opposing positions to accept. The Supreme Court has interpreted the First Amendment more as a way of protecting audience interests to hear information than as a matter of free expression of ideas (Stern, 1990).

The audience-interest interpretation of the First Amendment bases free speech rights on the right of an "audience to hear all the relevant positions represented in the discussion, so that they can make an informed decision concerning the matters which they are called upon to judge" (Stern, 1990, p. 937). Free speech is maintained in order to protect the interests of the audience, not the interest of the speaker. The case First National Bank of Boston v Bellotti exemplifies the trend toward an audience interest interpretation of the First Amendment.

The majority opinion in Bellotti was based on the protection of audience interest. "When speech is addressed to the public in the context of political debate, the preeminent consideration is that all the relevant viewpoints receive a fair hearing and not that each participant exercise his opportunity to speak" (First National Bank of Boston v Bellotti, 1978, p. 940). The Supreme Court ruled that any information relevant to the public discussion of political issues would be afforded First Amendment protection because of its potential value to inform the public. Citing Mills v Alabama (1966), the Court stated "'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of government affairs'" (First National Bank of Boston v Bellotti, 1978, p. 718). In a society based on choice, free speech is necessary to promote the discussion and resolution of public issues. Political speech is a special concern for the First Amendment. Greenawalt (1989, p. 146) notes that the justifications for free speech "take on extra weight when political matters are involved." The application of the First Amendment to political speech is of critical importance.

The Bellotti decision also upheld the prohibition of restricting free speech and extended the First Amendment to corporate speech. In respect to restricting free speech, the Court stated "the concept that government may restrict the speech of some element of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" (First National Bank v Bellotti, 1978, p. 727). All people/groups were to have First Amendment rights and the government should not be able to restrict any group from being involved in the discussion of public issues.

Finally, Bellotti is renown in corporate circles for establishing the First Amendment rights of corporate speech. The case ruled that corporations had a right to speak out on any issue--to participate in public debate even if the issue did not directly affect the corporation (Heath & Nelson, 1986). The Court ruled that the First Amendment was not restricted to a particular source. "It is the type of speech indispensible to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual" (First National Bank of Boston v Bellotti, 1978, p. 718. A corporation's information has as much right to be heard by an audience as an individual's information. The emphasis was on the right of audiences' to receive information, so as to make informed decisions in political matters, not on who was presenting the information.

Another aspect of the First Amendment is the right to petition clause. The right to petition refers to a citizen's right to voice his/her opinions to government officials and government bodies. Our whole system of representative democracy is predicated on the right to petition (Stanford Law Review, 1984). the right to petition covers any peaceful advocacy directed toward the electorate or any level or branch of government (Canan & Pring, 1988b). The First Amendment is supported by various state constitutions, federal and state civil rights laws, and numerous court decisions which serve to protect a citizen's right "to participate in and influence government decision making" (Pring, 1989, p. 9). SLAPPs preclude publics from receiving information and violate the petition clause of the First Amendment (Canan, 1989).

SLAPP's Threat to the First Amendment

SLAPPs are used to prevent citizens from expressing views on public issues (Canan, 1989; Canan & Pring, 1988a; Pell, 1990; Pring, 1989; Turque,et al., 1990). By any definition, the expression of views on public issues is political communication (e.g. Nimmo, 1978) since it involves the discussion of alternative points of view on an issue and offers information to publics concerning the resolution of public issues. More succinctly, SLAPPS are designed to prevent the political speech the First Amendment is designed to protect (Pell, 1990). Any effort to prevent the public debate of public issues, by the Supreme Court's rulings, should be a violation of the First Amendment. Preventing a particular side from speaking in the public debate prevents the audience from hearing the "spectrum of alternative points of view on issues of public dispute" (Stern, 1990, p. 939).

There is a distinct irony in the corporate use of SLAPPs. Corporations had to fight for First Amendment rights, a fight which culminated in the First National Bank of Boston v Bellotti (1978). Corporations work to maintain this protection and deride any attempts to constrain corporate speech (e.g. Heath & Nelson, 1986). So why are corporations the primary users of SLAPPs, a definite violation of First Amendment Rights? The answer appears to be advantage. By preventing public debate, corporations are able to complete projects (typically housing developments) with less resistance which equals less time and money (Pell, 1990). What is sacrificed for advantage is public debate to determine the impact of the project on various publics and the integrity of the First Amendment. Some corporations seem to want the First Amendment to protect themselves but not their opponents. Such a capricious use of the First Amendment should be a particular anathema to public relations personnel.

Public Relation's Stake in the First Amendment

Public relations as a field has recognized the importance of the interactive relationship between organizations and their environments. Pavlik (1987) and Pearson (1990) are two of many public relations writers who posit that systems theory is a paradigm for public relations theory. (See Pearson (1990) for an extend discussion of systems theory in public relations). Public relations takes an open systems perspective and focusses on how the organization and its environment interact. One example of this trend is the definition of public relations offered by Crable and Vibbert (1986): the art of adapting organizations to publics and publics to organizations (here public is synonymous with environment).

Public relations' emphasis on the interactional perspective of systems also can be found in Grunig and Hunt's (1984) development of the four public relations models. One dimension of their models is two-way communication--communication between the organization and its publics. Dozier (1989) has even called for making the two-way symmetrical model (the goal of which is to increase understanding between publics and organizations) the center piece of public relations and public relations ethics. The common thread uniting these systems-oriented works is the notion of interaction--an exchange between organization and publics.

Public relations explicitly recognizes the need for the exchange of ideas or information. Heath (1988) views the healthy exchange of ideas between parties as an important element in the evaluation of corporate performance. Nelson (1990) goes further by arguing that public relations embraces the First Amendment's principle of diverse information being presented freely to publics. In fact, public relations should encourage the presentation of information from "diverse and antagonistic sources" (Nelson, 1990, p. 80). Such dedication to the exchange of information between parties and the right to express ideas is at the heart of issue management.

Issue management can be defined as the identification of issues and the application of systematic procedures designed to influence the issue's resolution in a manner favorable to the issue manager (Crable & Vibbert, 1985; Jones & Chase, 1979). One of the primary objectives of issue management is to allow groups to participate in the public policy making process (Hainsworth, 1990; Heath, 1990). Corporations no longer deem it viable to allow interest groups to shape the public policy making process in isolation. Instead, corporations have become more proactive--more active in trying to affect the public policy making process (Ryan, Swanson, & Buchholz, 1987). Issue management involves the exchange of ideas between corporations, interest groups, and the government. It is that exchange which is believed to shape the public policy making process.

SLAPP Threat to Public Relations

If we accept the systems orientation to public relations and the emphasis on exchange between publics and organizations, SLAPPS are a clear danger. SLAPPs serve to preclude, not to encourage, the exchange of information. Two-way communication and symmetry become impossible when one group is permitted to stop another group from being heard. SLAPPs silence public discussion by moving the issue to the courts and "chills" public discussion by punishing citizens who do speak out on an issue. Thus, SLAPPs threaten some basic, underlying assumptions that are currently in vogue in public relations.

Issue managers may view SLAPPs as a mixed blessing. On one hand, SLAPPs can be used to silence a group which opposes the issue manager. As conventional wisdom dictates, an idea unopposed is accepted. Take the typical SLAPP example of a developer trying to manage a zoning issue in an area. SLAPPs can prevent the opposing environmental groups from having a hearing before government officials and the court of public opinion. On the other hand, SLAPPs violate the premise of issue management by stifling the ability to participate in the public policy making process. Keeping with our hypothetical example, the environmental groups are denied the ability to participate in the discussion and resolution of the zoning issue. Irony is once more apparent.

Corporations have fought for the right of access into the public policy making process and fear losing that ability to participate (Ryan et al., 1987). Furthermore, there are concerns about the extension of First Amendment protection to the entire field of public relations (i.e., Pratt, 1990). Oddly, the same "corporate America" seems willing to deny the same access to groups who would oppose them and possibly cost them money. Once more the quest for an advantage leads to the suppression of the First Amendment--the right to petition the government and the right for audiences to receive diverse information related to decision making.

Implications: The Dangers of SLAPPs

It is unwise to dismiss SLAPPs as a passing fad or a minor annoyance. The use of SLAPPs is still legal and appears to be growing (Canan, 1989; Canan et al., 1990; Pell, 1990; Pring, 1989). Evidence suggests that SLAPPs are designed to quiet the opposition, not to win money in a libel or slander case (Turque et al., 1990). On a societal level, SLAPPs are a danger to the First Amendment. Publics are stripped of First Amendment rights when corporations and others use SLAPPs as a way to muzzle their opponents. People are not receiving the diverse information before making a decision on public issues if one side is prevented from speaking on the issue. People involved in communication especially should be outraged by the use of SLAPPs. This outrage should be felt strongly in public relations if the field truly wants to base itself on the exchange of information and ideas between organizations and publics. SLAPPs, then, threaten the practice and integrity of public relations.

Earlier it was noted that the objective of this paper was two-fold: to inform the readers about SLAPPs and to call for action. The call for action is directed toward public relations personnel. People in public relations must recognize the danger and hypocrisy of SLAPPs. Public relations practitioners can not use SLAPPs and still claim First Amendment rights or espouse a belief in the exchange of information and ideas. The field of public relations must condemn the use of SLAPPs if public relations is to be true to itself and its espoused principles. The condemnation can take two forms.

First, practitioners can council their organizations against the use of SLAPPs, even when the use of a SLAPP offers an advantage in resolving a public issue. Second, the field of public relations can develop joint efforts designed to remove the frivolous use of SLAPPs. Pring (1989) outlines a series of measures designed to neutralize SLAPPs. Those measures include extended immunity status for all petition activities, greater intervention into SLAPP cases by state attorney generals, and a fast judicial track for resolving SLAPPs which do violate First Amendment rights. The field which pioneered issue management should be able to use the principles of issue management to combat a threat to itself and to a basic societal freedom. This paper has placed most of the blame for SLAPPs on corporations and that is a some what unfair. Groups other than corporations do abuse SLAPPs. Still corporations are responsible for the bulk of SLAPPs. My hope is that after learning about the inherent threats SLAPPs pose to First Amendment rights and to the field of public relations, people in public relations will take up the fight to rid American society of this blight on the First Amendment.

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Selective Silence:
Major American Media and First Amendment Challenges

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On April 16, 1991, a United States District Court judge dismissed Nation, et al. v. United States. The case received four paragraphs of attention on page A7 of the New York Times. The coverage made the decision seem minor, but it has major implications for both press and public in the control of information during the nation's military conflicts —— implications largely ignored by major American media.

The plaintiffs in the case included 11 small magazines, wire services, newspapers and broadcast groups and five prominent U.S. writers. The plaintiffs brought the case January 10, 1991, arguing military restrictions of the media in covering Operation Desert Shield, and subsequently Operation Desert Storm, amounted to a "prior restraint" and were violative of the First Amendment. Not only did major American media decline to join the suit or file "amicus curiae" (friend of the court) briefs, most large papers and networks did not even cover the filing or disposition of the case. Far from being an aberration, the lack of attention and support given Nation v. U.S. is indicative of a pattern of skittishness on the part of major American media when smaller media mount First Amendment challenges. The battle cries heard when the New York Times or Washington Post take on the government are muted or changed when the fight is waged by alternative press or radical newspapers.

There are few scholarly studies of this apparent void of sweeping support for First Amendment freedoms, but in a historical look at the press and the First Amendment, John Lofton came to a singular conclusion.

> "One clear impression emerges from this survey of more than 175 years of press reaction to various freedom of expression issues in the United States. It is that, except when their own freedom was discernibly at stake, established general circulation newspapers have tended to go along with efforts to suppress deviations from the prevailing political and social orthodoxies of their time and place rather than support the right to dissent."[1]

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[1] Lofton, John. The Press as Guardian of the First Amendment. (Columbia, S.C.: University of South Carolina Press, 1980) p. 279.

The plaintiffs in the case were disturbed but not surprised by the reaction of large American newspapers. Erwin Knoll, editor of The Progressive magazine, based in Madison, Wisconsin, and a plaintiff in the case, had challenged the government on First Amendment grounds before and felt stung at the time by the lack of support. In the present case, he said, he did not expect much rallying of major media to the cause. His expectations were correct. "They (large newspapers) ignored it for the most part. The New York Times was late and gave it hardly perceptible coverage," Knoll said. "I think I had more calls from college newspaper editors than commercial media."[2]

What Knoll and his fellow plaintiffs argue is it is the prerogative of major newspapers to accept government imposition of press restrictions in the Gulf War. But it is the duty of those same papers to report to the public that other media do not accept the restrictions and are fighting for the public's right to know the whole story, not just the government line. Arguing for such coverage in a column for New York Newsday, Nation v. U.S. plaintiff Sydney Schanberg wrote:

> "I can understand why a news organization might conclude that the court system was not its forum of choice for confronting the issue. Choosing not to join the lawsuit is a decision honestly arrived at; but choosing not to report its existence is an act that brings shame on the profession."[3]

The decision to ignore the suit by the New York Times and Washington Post becomes less surprising when set against the backdrop of three landmark prior restraint.cases. The same decision on the part of the Chicago Tribune becomes both confusing and disheartening in light of those same cases. Near v. Minnesota (1931), New York Times v.United States: United States v. Washington Post (1971), and United States v. Progressive(1979) form the body of major prior restraint cases in the United States and indicate, save the Chicago Tribune, major American newspapers are not stalwart First Amendment defenders, except when their interests are directly threatened.

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[2] Erwin Knoll, interview with author, April 22, 1991, Madison, Wisconsin.

[3] Schanberg, Sydney. "Losers: Iraq and the First Amendment," New York Newsday, March 8, 1991.

Prior restraint, as understood by American Constitutional law, is the effort by government to control the dissemination of information before it occurs. As opposed to punishing a newspaper after publishing information deemed outside the bounds of law, prior restraint seeks to prevent the publication altogether. Never tested in the first 130 years of the U.S. Constitution, prior restraint is now considered an insidious action by government that, with few grave exceptions, the Supreme Court considers to always run afoul of the First Amendment. In the words of a prominent First Amendment attorney and scholar, "A criminal statute chills; prior restraint freezes."[4]

The aversion to prior restraint of speech and press is grounded in the notion of a robust political debate in the nation. In the 1931 decision in Near v. Minnesota, Chief Justice Evans Hughes wrote:

> "The conception of liberty of the press in this country had broadened with the exigencies of the colonial period and efforts to secure freedom from an oppressive administration. That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officials and charges of official misconduct."[5]

The Supreme Court held to the precedent set in Near in deciding New York Times v. United States, more popularly known as the "Pentagon Papers" case. It is difficult to discern whether the same would have held true for United States v. Progressive had it reached the high court, or whether the justices would have decided against The Progressive, using the only exception laid out in Near.

> "(T)he protection even as to previous restraint is not absolutely unlimited ... No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[6]

A closer look at these three cases is warranted to shed light on the present prior restraint challenge and major newspaper coverage of it.

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[4] Alexander Bickel, quoted by Friedman, Robert. "The United States vs. the Progressive," Columbia Journalism Review, July/August 1979, p. 32.

[5] Near v. Minnesota 51 S. Ct. 625 (1931).

[6] Ibid.

Near v. Minnesota (1931)

When Jay M. Near's Saturday Press began alleging in 1927 that Minneapolis was under the vice grip of a Jewish mob operation and police and city officials were looking the other way, he could hardly have known how he would affect press freedoms for generations to come. Near's paper, a small, weekly scandal sheet born of an earlier incarnation in Duluth, Minnesota, was to be the test case for the Constitutional doctrine against prior restraint.[7] In 1927, Near and his Saturday Press fell victim to Minnesota's "nuisance law." The statute, enacted in 1925, held that any publisher of a "malicious, scandalous and defamatory newspaper, magazine or other periodical" is guilty of a nuisance and could be permanently enjoined from publishing. A judge imposed such an injunction against Near, and the decision was twice upheld by the Minnesota Supreme Court.[8]

Lacking political muscle, fiscal stability and community support, Near's case may have died there and become the longest and most successful prior restraint in American history, setting a precedent of censorship that would chill the press. But Near found an unlikely comrade. After much consideration and debate, he was joined in the fight by Robert R. (Colonel) McCormick, the feisty conservative publisher of the Chicago Tribune, who would later become known as "The Daddy Warbucks of the First Amendment."[9] McCormick took up Near's cause, backing his First Amendment dedication with editorial and financial support and a team of high-priced attorneys. "Whether for personal reasons or because of lofty ideals, the Colonel was a man with a mission far ahead of his time and his peers. He had become a kind of one-man brigade fighting for the First Amendment," wrote Fred Friendly in his study of Near v. Minnesota.[10]

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[7] Friendly, Fred. Minnesota Rag. (New York: Random House, 1981) p. 3.

[8] Near v. Minnesota 51 S. Ct. 625 (1931).

[9] Friendly, Minnesota Rag, p. 66.

McCormick was no stranger to the chilling effect of litigation. Twice during the the decade before Near's prosecution the Tribune found itself in court, fiercely battling libel charges. The paper lost its first case to automobile mogul Henry Ford. The jury found McCormick's paper guilty of libel but awarded Ford only six cents in damages. Despite the seemingly favorable outcome, McCormick was upset by the case that had cost him half a million dollars to defend.[11] One short year later, McCormick again found himself in court, trying to defend his paper from a libel action brought by the mayor of Chicago over stories and editorials alleging he brought the city to the brink of fiscal ruin. This time, McCormick emerged victorious on both the district and appellate court levels. For years to come, he would quote the words of the judge and justices in the case, reasserting the right of the press and people to discuss government without fear of reprisal.[12]

It was these cases and a distrust of government that brought McCormick to Near's cause. He would later write that he did not take to Near's ideas but to his rights. "It was feared that a method of curbing the press having been found in one state would be copied in other states whenever the corruption and effrontery of the politicians in power reached a sufficient debasement."[13]

When the Tribune took up the case, McCormick forced the attention of the nation on the small scandal sheet that had been closed down in Minneapolis. Arguing in frequent editorials, McCormick wrote of a law that,

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[10] Ibid, p. 70.

[11] Ibid, p. 73.

[12] Ibid, p. 75.

[13] Ibid, p. 78.

> "is not compatible with freedom of the press and is the most flagrant device for the suppression of criticism of government that has been devised for a century. Under cover of suppressing malicious and irresponsible comment, it puts in the hands of corruptionists and malefactors in office a means of preventing exposure and robs the public of its right to know whatever is charged against their representatives in office."[14]

Having largely ignored Near and his case previously, large papers like the New York Times looked more favorably on it when McCormick began the charge. After his poignant plea to the American Newspaper Publishers' Association (ANPA) to support the challenge in April 1929, the Times began editorials in favor of the case, but still relied largely on Tribune editorials for guidance. "As Colonel McCormick says, however, if it is constitutional in Minnesota, it is constitutional in any other state or as a federal statute."[15]

Despite this newfound support, however, the Times seems to stress the importance of the ANPA, rather than Near's fundamental freedoms as a dissenting voice. "(T)he passage of the resolution again demonstrates the important opportunity for public service afforded by the American Newspaper Publishers' Association."[16] In addition, taking its own interests to heart, rather than the interests of smaller voices like Near's, the Times editorials stressed monetary considerations over concern for free expression. In speaking of the nuisance law as could be applied to larger press in other states, the editors wrote, "For not only are *property rights* destroyed, but the source of public information is blocked or cut off."[17] (emphasis added). It would be naive to argue that McCormick was not considering his own financial security in battling prior restraint, but his unflinching support of Near from the outset appears a beacon when set against the Times delayed and, at times, half-hearted response.

Given the prevailing community and political sentiment of the age, Near v. Minnesota could hardly have been considered a "good" test case. McCormick and his attorneys took up the defense of an unpopular "rag" that was symbolic of what many considered an irresponsible press run amuck. But some argue that it was just that fact that made the Supreme Court's 5-4 decision in favor of Near so significant and lasting a precedent. It set the outer bounds for defense of First Amendment freedoms, using not a mainstream, reputable, large-circulation daily, but a scandal sheet from a growing but relatively small town. Its significance as a test case cannot be understated. Likewise, Near's supporters, detractors and those who chose to mainly steer clear of his case are also important in the continual struggle for First Amendment protection for all media. Friendly writes that although there was support among major media led by the Tribune:

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[14] "The Minnesota Nuisance Law, unsigned editorial, Chicago Tribune, March 11, 1930.

[15] "A Vicious Law," unsigned editorial, New York Times, April 26, 1929.

[16] Ibid.

[17] Ibid.

> "(T)he pendulum swings; Near's landmark status will continually be reread in the context of history. Whether its significance is to be upheld or eroded is a question whose answer lies ahead in American law and liberty, in our newsrooms no less than in our courtrooms."[18]

New York Times v. United States (1971)

The importance of the Near v. Minnesota decision for major American media is stunning and was exhibited nowhere better than in New York Times v. United States; United States v. Washington Post (1971) — the Pentagon Papers case. Brought to the Supreme Court separately, the two cases fought for both papers' rights to publish the government's 30-year history of America's involvement in Indochina. The Supreme Court, in a hasty 6-3 decision, affirmed those rights, relying largely on the doctrine set forth so powerfully in Near.[19]

The U.S. involvement in Vietnam was a volatile issue in early 1971 when Neil Sheehan and his colleagues began to take extended leaves from their New York Times Washington bureau under the pretenses of reassignment, special investigation or vacation.What Sheehan and the others were compiling was an exhaustive look at the "Pentagon Papers," a history leaked to them by Daniel Ellsberg. When the Times began publishing a series on the papers June 14, 1971, then U.S. Attorney General John Mitchell waged a battle in the courts that may have even taken the Times by surprise. When the Post snared a copy of the papers and began publishing soon after suppression of the Times stories, it, too, found itself fighting for its rights in federal district court.

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[18] Friendly, Minnesota Rag, p. 179.

[19] New York Times v. United States; United States v. Washington Post 91 S. Ct. 2140 (1971).

Though decisions on the district and appellate levels differed for the Post and Times, two elements of the cases were identical — Supreme Court affirmation of their rights and unyielding editorial support. When the government won an injunction against the Times in district court, the paper's editorial proclaimed dedication to the fight.

> "A fundamental responsibility of the press in this democracy is to publish information that helps the people of the United States to understand the processes of their own government, especially when those processes have been clouded over in a hazy veil of public dissimulation and even deception."[20]

The Post furthered the cause the following day, claiming the government's case was patently unconstitutional and alleging Mitchell had other motives in pursuing an injunction against the Times. "(T)he federal government does not have a constitutional leg to stand on in its effort to censor the contents of a newspaper."[21] Indeed, the Post's conclusion was reminiscent of McCormick's editorials on Near v. Minnesota.

> "A press that can be formally prevented by government from printing what it will -- forbidden in advance to print it -- is no more than a tool of government and one that can be used as the government may wish to deceive and mislead."[22]

When the Supreme Court handed down its decision affirming the newspapers' rights, both wrote broadly of the need for an "enlightened people" and the fundamental importance of a free press to democracy. The Post's editors could hardly have been more sweeping in their proclamation. "It is the purpose and the effect of the First Amendment to expose to the public the maximum amount of information on which sound judgment can be made by the electorate."[23] The Times, quoting Justice Potter Stewart's opinion in the case, said, "'Without an informed and free press,' as Justice Stewart said, 'there cannot be an enlightened people.'"[24] The Chicago Tribune, in an editorial that might have sent Colonel McCormick reeling, actually supported restraint of the publication until the issues could be sorted out more clearly. In an editorial entitled "Sorry About This," the paper said a delay of publication was tolerable to determine "the perils that indiscriminate publication of classified documents would entail."[25]

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[20] "The Vietnam Documents," unsigned editorial, New York Times, June 16, 1971, p. 44.

[21] "...And the Press's Right to Publish," unsigned editorial, Washington Post, June 17, 1971, p. A18.

[22] Ibid.

The Pentagon Papers case appears the exception to the rule for two reasons. First, such sweeping support for First Amendment freedoms is seldom the highlight of the Times or Post editorial pages. Second, rather than adhering to their "watchdog" image, major American media seem resistant to closely scrutinizing government and more often accept the government line. Lofton's First Amendment study found evidence for this conclusion.

> "National security has become the modern equivalent of seditious libel in the government's legal arsenal for keeping the press at bay. And the press, despite its frequent emphasis on the right to know, has been timid about risking the government's fire unless one of the powerful members of its own fraternity is threatened, as in the Pentagon Papers case."[26]

Comments by New York Times columnist James Reston become ironic in light of that conclusion and when considering both papers' subsequent stands when it was a small, middle western magazine taking on the federal government. At the outset of the Pentagon Papers controversy, Reston wrote, "The documents prove once more that truth is the first casualty of war and that war corrupts good men."[27]

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[23] "The Pentagon Papers: Free — At Last," unsigned editorial, Washington Post, July 1, 1971, p. A22.

[24] "An Enlightened People," unsigned editorial, New York Times, July 1, 1971.

[25] Friendly, Minnesota Rag, p. 177.

[26] Lofton, The Press as Guardian of the First Amendment, p. 283.

[27] Reston, James. "The McNamara Papers," New York Times, June 13, 1971, sec. 4, p. 12.

United States v. Progressive (1979)

If the New York Times and Washington Post thought truth was the first casualty of war in 1971, by 1979, the First Amendment had become the second. When The Progressive sought in 1979 to publish "The H-Bomb Secret: How We Got It, Why We're Telling It," Editor Erwin Knoll expected adversity from government and support from media. Instead he got adversity from both. Rather than major media staunchly protective of his rights, he found large circulation newspapers urging him to drop the case so as not to jeopardize "their" freedoms. "They regard the First Amendment as their property, and they're not interested in sharing it with anyone else," Knoll said.[28]

Confronted in phone calls, editorials and news coverage, Knoll found himself alone in an uphill battle to establish his right to publish the article, a compilation by freelancer Howard Morland. Knoll said he wanted the story to reveal that the U.S. system of document classification had failed and anyone, including Morland or enemies of the United States, could access information sufficient to build a hydrogen bomb. The story, Morland and Knoll argued, contained no classified information. The government countered that the compilation itself constituted a violation of the Atomic Energy Act, a provision of which allowed the government to enjoin publication of atomic secrets. Information on the bomb, the U.S. attorneys argued, was "born secret." In other words, the workings of the bomb were of such a nature that at the moment the technology was discovered, it was inherently classified.[29]

Federal District Court Judge Robert W. Warren agreed.

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[28] Erwin Knoll, interview with author, April 22, 1991, Madison, Wisconsin.

[29] DeVolpi, A., Marsh, G.E., Postol, T.A. and Stanford, G.S. Born Secret: The H-Bomb, the Progressive Case and National Security. (New York: Pergamon Press, 1981) p. 13.

> "The facts and circumstances as presented here fall within the extremely narrow recognized area, involving national security, in which a prior restraint on publication is appropriate. Issuance of a preliminary injunction does not, under the circumstances presented to the court, violate defendants' First Amendment rights."[30]

The decision was a blow for Knoll and The Progressive, but also for the doctrine of presumption against prior restraint. The government was successful in prohibiting publication while the magazine sought an appeal until the case unravelled in September 1979. Striving to show that Morland's article did come from unclassified information, a variety of sources, from an 18-year-old student to a noted scientist, began sending letters to newspapers, detailing the inner workings of the H-bomb and how simply the information could be gleaned from public documents. A small Madison newspaper, followed the next day by the Chicago Tribune, published one of the letters. The government dropped the case on appeal, and Knoll published Morland's article in November 1979. At six months and 19 days, it was the longest prior restraint in American history.

A striking legacy of the case lingers in the back issues of major American newspapers. While the New York Times, weak-kneed in its initial response, did eventually support The Progressive editorially, most saw it as too little, too late. The Washington Post was singular minded in its condemnation of Knoll and his magazine for pursuing the case to begin with. But the Chicago Tribune, again adhering to the emotion of the Near v. Minnesota decision, part of which McCormick had chiseled into the marble in the paper's lobby, took to the forefront in defending The Progressive's rights.

That support, Knoll said, was unflinching and important to the pursuit of the case. "In the middle of all this, I got a phone call from the editor of the Chicago Tribune. He said, 'Mr. Knoll, I'm not calling to give you advice. I'm calling to tell you we believe the First Amendment is very important, and we are prepared to give you any help we can,'" Knoll said.[31] That support manifested itself in the filing of an amicus curiae (friend of the court) brief and stinging editorials condemning "keeping a non-secret" and suggesting the doctrine of bomb information being "born secret" had "alarming implications of thought control."[32] The Tribune's argument from the outset was that while The Progressive article might not serve a public interest, it is protected by the First Amendment.

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[30] United States v. Progressive 467 F. Supp. 990 (1979).

[31] Erwin Knoll, interview with author, April 22, 1991, Madison, Wisconsin.

> "We have not read the article and have our own private doubts about what purpose it is supposed to serve, but that is a judgment the First Amendment quite plainly — and traditionally — forbids the institutions of government from making."[33]

In addition, the Tribune's editors argued, prior restraint must be reserved for the gravest of circumstances when there is a clear, imminent danger to the American public. This case, it said, does not satisfy that requirement. "We don't think there can be substantial secrets about a device that has been produced by five different governments. We don't think the courts should be looking for new approaches to justify prior restraint."[34]

The Washington Post was equally clear in its sentiments though they were opposite. Its two arguments were that there is no public interest to be served by publication of H-bomb information and the case was a "bad test" of the First Amendment that might set a precedent jeopardizing press freedoms. "As a press-versus-government First Amendment contest, this, as far as we can tell, is John Mitchell's dream case — the one the Nixon administration was never lucky enough to get: a real First Amendment loser."[35] The same editorial argued that there were fundamental differences between this case and the Pentagon Papers, most importantly that this case involved a specific prohibition in the Atomic Energy Act and The Progressive was a monthly publication that would be less harmed by a prior restraint than a daily newspaper.

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[32] "The 'Progressive' Bomb Fallout," unsigned editorial, Chicago Tribune, April 4, 1979, sec. 5, p. 2.

[33] "Secrets of the First Amendment," unsigned editorial, Chicago Tribune, September 9, 1979, sec. 2, p. 4.

[34] "The 'Progressive' Bomb Fallout."

[35] "John Mitchell's Dream Case," unsigned editorial, Washington Post, March 11, 1979, p. C6.

While the first argument may have merely been a smoke screen, the second was wholly untenable. The magazine's publication time frame had nothing to do with the matter, as the Post initially was favoring a permanent injunction if the magazine did not have the "good sense" to drop its challenge. As the case unravelled, the Post turned to the argument that the government must do a better job of securing the secrecy of documents it does not want disseminated. However, all the paper's editorials on the case ring with the sentiment that The Progressive was endangering the rights of major newspapers in pursuit of freedoms it could not rightfully claim.

Writing for the Village Voice in 1979, Nat Hentoff referred cynically to the "First Amendment Club" imagined by editors and publishers of major American newspapers, alleging they had little time for those they considered non-members. Those outside the club would include Erwin Knoll and Jay Near, and that is dangerous for all others without access to a major medium and, indeed, for the First Amendment itself. Though there may be hundreds of reasons for this lack of support, three emerge as the most viable explanations: fears of "bad precedent," concerns about public approval and corporate structure and acceptance of the government line.

Bad Precedent

While some would argue that this contention by major newspapers is nothing more than a red herring, these newspapers do have much to lose if the government succeeds in the imposition of a prior restraint. As the Washington Post argued in urging The Progressive to drop its case, "Once the door is open to advance judicial scrutiny of what the press may publish, it will never be closed. The loss would be immensely destructive."[36] But there are two major flaws with this argument. First, it is unlikely major media will ever consider it a "good" test case when a small medium or member of the alternative press challenges the government. Those voices tend to be the furthest from the mainstream, and thus the most confrontational to societal norms. It is easy for major dailies to dismiss as radical any of those voices. Basing support on evaluations of what constitutes a "good" case is tenuous, at best. Also the major media base these evaluations without all the facts of the cases in hand. In the Progressive instance, the Post said, "In fact, we doubt that The Progressive, or any other responsible publication, would print such material after the government has made as strong a showing of proper secrecy and potential danger as it has in this case."[37] In reality, the government had made no such showing, as Judge Warren noted in his decision.[38] Even if such evidence had been entered, the Post would not have known, as the bulk of the record in the case was sealed. The paper relied on assumptions.

Second, waiting to fight the government until a favorable precedent is assured renders the freedom meaningless. Knoll said:

> "That says don't exercise your First Amendment rights because you might lose them. Well why have them? You've lost them already. My response to that is there is never a 'good' case. If they were easy, they wouldn't be cases at all. Nobody's going to get into a big hassle over the right to publish a recipe for egg salad."[39]

Even the Pentagon Papers was not considered a sure winner, given the social and political air of the time. Yet the Post and the New York Times were connected enough to it and believed enough in it to find it a "good" case. Perhaps Post editors should revisit Near v. Minnesota, upon which their 1971 victory was based. Jay Near was not a "good" case either; he was a scandal peddler. But without his fight, the press system in the United States and the guaranteed protection of it might be laughable today.

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[36] "The Progressive and the Bomb," unsigned editorial, Washington Post, March 28, 1979, p. A22.

[37] Ibid.

[38] United States v. Progressive 467 F. Supp. 990 (1979).

[39] Erwin Knoll, interview with author, April 22, 1991, Madison, Wisconsin.

Public Support

Knoll argues the fundamental reason for the lack of support in his case was a fear of public backlash. "My concern is with those polls that show how most Americans are indifferent or hostile toward the exercise of First Amendment rights," he said.[40] A survey conducted in December 1979 found that 77 percent of Americans disagreed that "A newspaper has the right to print a story about how to make an H-bomb, even when the government says this story might help other countries make such weapons." Only 14 percent agreed with the statement.[41] A 1970 survey found a majority of U.S. adults do not approve of free speech or press when it expresses "unpopular ideas." Lofton wrote, "Majorities of those questioned opposed allowing people to make speeches against God and allowing the publication of books attacking our system of government."[42] He also found the press became more supportive of protection for certain obscenity when public acceptance grew. "Leading newspapers have seldom committed themselves unequivocally to the defense of freedom of expression for unpopular materials or views espoused by weak special-interest publications," he concluded.[43] But the irony of this explanation, as well, is that waiting for popular support for First Amendment challenges means those challenges will never be brought. Again, to turn to Jay Near, "In 1931 an American public plagued by economic panic, unemployment, Prohibition and the likes of Al Capone cared little about the civil rights of a scandalmonger from Minnesota."[44]

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[40] Ibid.

[41] Immerwahr, J. and Doble, J. "Public Attitudes Toward Freedom of the Press," Public Opinion Quarterly, vol. 46(1982) p. 183.

[42] Lofton, The Press as Guardian of the First Amendment, p. 286.

[43] Ibid, p. 283.

[44] Friendly, Minnesota Rag, p. 173.

Acceptance of the government line/Corporate structure

The final explanation involves the idea that the major American newspapers have surrendered their roles as scrutinizers of government and this surrender is influenced by their ownership. Ben Bagdikian argues the concentration of American media into wealthy conglomerates has had a detrimental effect on support for the First Amendment.

> "(W)hen they have to choose between, on the one hand, candidates who will dispense governmental favors in the form of corporate taxes and relaxed business regulation, or, on the other hand, candidates who will support freedom of information, the record is not encouraging. The history of Big Government and Big Corporations is more one of accommodation than of confrontation."[45]

The New York Times editorial comment on "property rights" in Near v. Minnesota is reflective of this commitment to the bottom line. Lofton argues this cooperation between large media and government has had a chilling effect since the administration of John Adams. From Federalist newspapers suppressing those supporting the French Revolution to Northern papers favoring suppression of the abolitionist press, he writes, the major dailies have not supported others' First Amendment rights. In World War I, Lofton writes, "There was an almost total abdication by the general circulation press of any responsibility to uphold freedom for dissent."[46]

Even the government recognizes a trend and takes confidence in it. Commenting on the major media and the Atomic Energy Act that was later used to go after The Progressive, Atomic Energy Commission counsel Herbert S. Marks said:

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[45] Bagdikian, Ben. The Media Monopoly, third edition. (Boston: Beacon Press, 1990) p. 8.

[46] Lofton, The Press as Guardian of the First Amendment, pp. 279-281.

> "The press and the publishing industry have apparently accepted the principle that whether or not the Act, strictly construed, applies to unofficial as well as officials secrets, they will publish nothing in the face of advice by the commission that the publication would be prejudicial to national security."[47]

Indeed, even after a study of the Pentagon Papers, supposedly the major media's shining moment in confronting the government, Martin Shapiro argues press acceptance of the government line is institutional.

> "Nobody needs to sue or prosecute anybody ... (T)he general level of loyalty to the government is so high that newsmen do not want to disclose secrets damaging to national security and editors and owners would not want to risk reader and viewer reactions by doing so."[48]

However, Schanberg points to recent history for explanations of such acceptance.

> "It's my belief that the press is still living with its own scars from Vietnam. And Watergate. We were accused, mostly by ideologues, of being less than patriotic, of bringing down a presidency, of therefore not being on the American team. And as a professional community we grew timid, worried about offending the political establishment. And that establishment, sensing we had gone under the blankets, moved in to tame us in a big and permanent way."[49]

Nation, et al. v. United States (1991)

When The Nation magazine called other media to mount support for a challenge to the military's press restrictions in the Persian Gulf, it found a receptive ear at The Progressive and other small media like it. It got no response from major corporate media.[50] "They complained to the Pentagon, many of them, but they preferred to do their negotiating in private," Knoll said.[51] This decline did not bother the 11 plaintiffs that signed on to fight the case nor did it inhibit the argument of it.

What the plaintiffs were opposing was the Pentagon-organized press pool system and a pattern of censorship of war news. The restrictions they fought were exclusion of journalists from the battlefield, restrictions on access to military installations, and preferential treatment of major media reporters for acceptance into the press pools. The plaintiffs argued the restrictions and the exclusion of certain reporters from the press pools were unconstitutional prior restraint of their First Amendment freedoms.[52] After press restrictions were lifted March 4, 1991, the government attorneys moved for dismissal of the case, arguing it was moot as reporters now had free access to the Gulf region. The plaintiffs maintained the Pentagon's admission that it would apply similar, if not the same, restrictions in future conflicts meant the case was still justiciable and they were deserving of injunctive relief. Leonard Sand, U.S. District judge for the Southern District of New York, dismissed the case April 16,1991, finding that it, indeed, was moot because both the restrictions and the conflict had ended.

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[47] "Does the Progressive Have a Case?" Columbia Journalism Review, May/June 1979, p. 27.

[48] Shapiro, Martin. The Pentagon Papers and the Courts. (San Francisco: Chandler Publishing Co., 1972) p. 19.

[49] Schanberg, Sydney. "Censoring for Political Security," Washington Journalism Review, March 1991, p. 26.

[50] Erwin Knoll, interview with author, April 22, 1991, Madison, Wisconsin.

[51] Ibid.

> "(T)his Court cannot now determine that some limitation on the number of journalists granted access to a battlefield in the next overseas military operation may not be a reasonable time, place and manner restriction, valid under the First and Fifth Amendments."[53]

The outcome of the case was identical to another brought by Hustler publisher Larry Flynt in 1983 to battle the exclusion of the media from the U.S. invasion of Grenada.[54] The present decision left the plaintiffs questioning whether the newfound brevity of U.S. military actions will preclude challenge of press restrictions on First Amendment grounds. By examining news and editorial pages of major American newspapers, it appears those publications were not concerned by the disposition of the case.In covering reporters' complaints about the information apparatus in the Gulf and the meager numbers allowed into the press pools, neither the New York Times nor the Washington Post mentioned the suit against the government over those very issues. In the stories, both papers turned their attention to major media representatives, including their own reporters, and ignored the members of the press almost universally excluded from the Pentagon system. Even the Chicago Tribune, once relied on as staunch defender of the First Amendment, ignored the case. Knoll argued:

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[52] Nation, et al. v. United States 91 Civ. 0238, First Amended Verified Complaint filed January 24, 1991.

[53] Opinion of U.S. District Court Judge Leonard B. Sand, Nation, et al. v. United States, 91 Civ 0238 (1991).

[54] Flynt v. Weinberger, et al 763 F.2d 134 (1985).

> "Here and there, a few media voices were raised in protest against unprecedented government restrictions on news coverage, but for the most part, the mainstream media honored the time-worn slogan of the complacently contented: If you want to get along, you go along."[55]

The lack of press attention for the Nation suit fits the general framework of previous selectivity in First Amendment fights. Some argued that judicial affirmation of the government's ability to restrict reporters in military situations would mean future military conflicts marked by more harsh restrictions than those seen in Grenada, Panama or the Persian Gulf. Secondly, public approval for censorship of the press was strikingly united. A Time/Cable News Network poll found 88 percent of those surveyed approved of government censorship of the news media.[56] In addition, when surveyed by Times Mirror Corporation about how they felt the press pool system served the American public interest, 35 percent answered "very well" and 51 percent answered "fairly well."[57] Asked at the outset of the war if they felt the Bush Administration and the military had been cooperative enough in providing information to news organizations, 84 percent of those polled by Gallup Organization answered "yes."[58] In the face of this kind of support for military restrictions, it is likely major American media bowed to what they considered reigning public opinion. Finally, toeing the government line during military crises is not uncharted territory for large newspapers. In addition to supporting the government's interpretations, the major media also risked losing their preferential credentials for covering the Gulf War. In scolding major media for ignoring the Nation case, Schanberg wrote:

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[55] Knoll, Erwin, unpublished speech authored March 1991.

[56] Time/CNN poll conducted January 24, 1991, by Yankelovich Clancy Shulman. Data retrieved April 12, 1991, Public Opinion Location Library. Population size = 1,000.

[57] Times Mirror poll conducted March 14 to 18, 1991, by Princeton Survey Research Associates. Data retrieved April 12, 1991, Public Opinion Location Library. Population size = 1,857.

[58] Gallup Organization poll conducted January 17 to 20, 1991. Data retrieved April 12, 1991, Public Opinion Location Library. Population size = 1,019.

> "And when you censor yourself like this because you don't want to offend the government, you should not be surprised that the government reads this as a manifestation of supineness and, smiling, heaps its own censorship on top of your own."[59]

He argues this is merely a continuation of major media acceptance of press restrictions from the beginning.

> "They (large media) would rather wait until the war is over. But if they wait — and certainly they know this — their abdication will be a fait accompli. They will have surrendered to the government their historical role as the principal independent conveyor of information to the public. And surrendered it not just in wars but in every other situation that the government in the future believes it can control. Big Media is allowing this precedent to be set; it can blame no one else if it fails to stand up now."[60]

Viewed against theories on the meaning of the First Amendment and the intentions of the framers of the Constitution and Bill of Rights these cases suggest some changes to be made in the American press system and other institutions to protect and reinforce rights of free expression.

General theories on the First Amendment find its importance lies in four basic areas: individual self-fulfillment; attainment of truth; fostering of self-governance; and retention of balance between stability and social change.[61] Alexander Meiklejohn argues the fundamental purpose of the First Amendment is to foster self-governance. His focus is not on the right of the speaker, but on the necessity that his voice be heard.

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[59] Schanberg, "Losers: Iraq and the First Amendment."

[60] Schanberg, Sydney. "The Press Must Break Bush's Shackles," New York Newsday, February 12, 1991.

[61] Emerson, Thomas. Toward a General Theory of the First Amendment. (New York: Random House, 1963) p.3.

> "Shall we give hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must by guided not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear."[62]

In Schanberg's view, the establishment press have failed to put these academic principles to practical use. That failure, he argues, renders the freedoms moot.

> "The press must risk being unpopular. Not to take this risk could condemn ourselves and the public to a system of controlled information, an example of which is the hollow reporting we are now getting from the front, which is really little more than government communiques."[63]

The New York Times and Washington Post apparently did not take note of landmark words from U.S. District Court Judge Murray Gurfein in affirming the Post's rights in the Pentagon Papers case.

> "The security of the nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know ... These are troubled times. There is no greater safety valve for discontent and cynicism about the affairs of government than freedom of expression in any form."[64]

It is doubtful major American media will awaken to the notion that a threat to one voice is a threat to all. Short of that, the changes to be made to affirm First Amendment rights might include: expansion of dissenting views in major American media; continued perseverance on the part of small media when confronting government; and public education concerning the importance of free speech and press and dedication to them.

Expanding the space allotted for dissenting views in major media is a more difficult task, as it requires the dominant press to address problems that are not necessarily a source of concern for them. Lofton argues:

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[62] Meiklejohn, Alexander. "Free Speech and Its Relationship to Self-Government," Political Freedom. (New York: Harper and Brothers, 1960) p. 57.

[63] Schanberg, "The Press Must Break Bush's Shackles."

[64] United States v. Washington Post 446 F. 2d 1327 (1971).

> "Even if they differ widely on political and social philosophy, editors and publishers should be able to unite in recognizing their responsibility to plead for the widest possible scope for the constitutional guarantee that was extended to the press alone among private enterprises, not simply to enable it to make money but also to enable it to carry out a public trust."[65]

Unfortunately, Lofton has little faith in the success of such an idea. "Such suggestions, of course, are predicated on the assumption that editors and publishers are committed to freedom of expression, which is probably unrealistic, given their often demonstrated lack of commitment."[66]

Continued perseverance by smaller media is, by far, the most ironic solution. Confronted by lack of support from other media, the initial inclination would be to give up. But without challenges mounted by those like Jay Near, First Amendment precedent would be hollow and nearly void. It is the voices like Knoll's that urge a continued fight, and rightfully so.

> "It's always a case where there is good reason for somebody to want to suppress it (publication). So I think we need to find the 'worst' cases and press them. If Larry Flynt isn't protected, I'm not protected. If you let those cases go, you've lost the whole shooting match."[67]

Finally, and undoubtedly most importantly, public awareness of and dedication to the importance of First Amendment freedoms must be instilled through education. This solution is the most vital because it attacks major media lack of commitment on all three fronts. If papers like the New York Times or Washington Post are truly not supporting free press challenges out of fear of public backlash, education would turn the tide of public sentiment and eliminate the cause. If the lack of support is due to fear of bad precedent, that, too, would be eliminated because fundamental acceptance of dissenting voices would then be a societal norm and cases brought by those media would no longer be considered radical, thus "bad." Finally, a public versed in the importance of free expression to self-governance will inherently be more questioning of government. Hence, in serving that public, major American media will be more searching in their inquiries and less likely to toe the government line.

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[65] Lofton, The Press as Guardian of the First Amendment, p. 285.

[66] Ibid, p. 290.

[67] Erwin Knoll, interview with author, April 22, 1991, Madison, Wisconsin.

The likelihood of these sweeping changes is questionable, at best, but the necessity to better inform the public on its need to be informed finds broad support. Colonel McCormick focused on the idea in rallying for Near's defense in 1929.

> "The nuisance law is an evidence that reflects upon the schools and the newspapers of Minnesota which have failed to educate this generation in American institutions. What is needed in Minnesota, apparently, is a primer devoted to the story of human liberty with a special emphasis upon the rights of the citizen as established after centuries of struggle in England and America."[68]

Thirty years later, Meiklejohn wrote, "It is the mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed."[69] Twenty years hence, Lofton, commenting on polls showing tremendously poor public support for dissenting opinions, wrote, "Obviously there was a serious lack of understanding of one of the basic tenets of the American constitutional system for which the press must bear some of the blame and which it should feel some obligation to correct."[70]

And Knoll continues to argue:

> "There is an authoritarian attitude that we impart to kids at a very young age. We don't instill in them an attitude of questioning, of challenging, of refusing to accept the conventional wisdom. I would try to restore to people the idea that the First Amendment belongs to all of us and people need not only to appreciate it, but to exercise it. Like any muscle, if we don't exercise, it will atrophy, it will wither, it will die."[71]

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[68] "Minnesota Joins the Monkey States," unsigned editorial, Chicago Tribune, March 28, 1929.

[69] Meiklejohn, "Free Speech and Its Relationship to Self-Government," p. 27.

[70] Lofton, The Press as Guardian of the First Amendment, p. 286.

[71] Erwin Knoll, interview with author, April 22, 1991, Madison, Wisconsin.

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METRO BROADCASTING *V.* *FCC*

U.S. Supreme Court Affirms FCC's Minority Preference Policies

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METRO BROADCASTING v. FCC

Supreme Court Affirms FCC Minority Preference Policies

I. INTRODUCTION

Former television correspondent Marlene Sanders recently wondered about the effects of white male dominance on the broadcast industry. During a meeting of the International Radio & Television Society, she said:

> "I don't think anyone would argue that on-air women are better looking than on-air men. Local anchor teams look like most men's second marriages. . . . Do women holding top jobs _really_ make a difference in making those kinds of decisions? Or do they, like men, look at the ratings and let them decide?"[1]

Sanders' question alludes to an issue that for years has concerned the Federal Communications Commission (FCC), the regulatory agency mandated by Congress to ensure that the nation's airwaves are used in the "public interest, convenience and necessity."[2] The FCC has concluded that the individuals holding the top jobs in the broadcast industry _do_ affect the tone and content of what is broadcast.[3] And, recognizing the importance of a diversity of viewpoints in the American process of self-government, the agency has established policies to ensure that diverse perspectives and values -- including those of minorities and women -- are represented in the government's allocation of the physically limited broadcast spectrum.[4]

One way the FCC attempts to foster its goal of promoting diverse viewpoints in broadcasting is to give minority enterprises an advantage in the broadcast license acquisition process, both with respect to new licenses and the purchase of existing ones.[5] The FCC's rationale is that such a policy will ensure that minority business persons function in the top jobs -- as media "gatekeepers" -- controlling the tone and content of what is broadcast.[6]

Two FCC policies aimed at increasing programming diversity by providing advantages to underrepresented minorities have been challenged in the courts as being discriminatory against non-minority license aspirants and in violation of the U.S. Constitution. The first, the "distress sale" policy,[7] was recently challenged by a non-minority license-seeker who maintained that the policy violated his due process rights under the Fifth Amendment.[8] The U.S. Court of Appeals for the D.C. Circuit supported his claim and held the policy unconstitutional. During the legal process, the FCC also filed a brief that questioned the underpinnings of its own policy.[9] The second policy, the FCC's practice of awarding merit during the license application process for minority ownership and management participation,[10] was challenged by an unsuccessful non-minority applicant for a new television station license.[11] The D.C. Circuit had remanded the appeal for further consideration because the FCC was holding an inquiry into the validity of its race- and gender-based policies. However, when Congress cut off funding for FCC re-examination of any of its minority preference policies, the agency abandoned the inquiry and reaffirmed its license grant to the minority applicant. The D.C. Circuit then affirmed the judgment.[12]

The Supreme Court agreed to hear both cases jointly.[13] On June 27, 1990, a divided Supreme Court issued an opinion upholding the constitutionality of both policies.[14] In _Metro Broadcasting, Inc. v. FCC, Astroline Communications v. Shurberg Broadcasting_ (hereafter referred to as _Metro Broadcasting_), the court held that the FCC policies do not violate equal protection provisions of the Constitution. Both policies, the court reasoned, bear the imprimatur of long-standing congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity.[15]

This paper will attempt to put the Supreme Court's ruling into legal and historical perspective. First, it will look at how the Supreme Court has dealt with affirmative action issues generally and at what legal rules have evolved. Second, it will briefly outline the legal basis of the FCC's authority over broadcasting and the development of its mandate to foster program diversity. Third, it will show how this mandate for program diversity led to the development of its minority preference policies. It will then look at the FCC's attempt to revisit some of these policies, and Congress' decision to withhold funding for such hearings. Fourth, the paper will look at the legal rules the Supreme Court adopted in _Metro Broadcasting_ and how the court's reasoning squares with other affirmative action cases. Finally, it will suggest that the Supreme Court's 5-4 ruling, while a victory for affirmative action, is tenuous given the present balance on the court and the strong possibility of a greater conservative shift following the resignations of Justice William Brennan and Thurgood Marshall, the court's liberal cornerstones. The paper will argue that the FCC's minority policies are consistent with other commission policies, which the Supreme Court has affirmed, that give the FCC broad discretion over the broadcasting industry on the theory that a broadcasting license is a privilege, not a constitutional right. The paper will conclude, however, that by grounding its holding in part on the special regulatory status of the broadcasting industry, the court may have limited the scope of its ruling and left open the possibility of an opposite outcome under different federal regulatory schemes.

II. AFFIRMATIVE ACTION AND THE SUPREME COURT

The question of the constitutionality of affirmative action[16] first reached the U.S. Supreme Court in 1974 after a white plaintiff challenged a law school admission policy that set aside a certain number of class positions for minority applicants. The plaintiff argued that the school admitted less qualified applicants, thereby denying him admission. After the plaintiff had been admitted under a court order and neared graduation, the court, on a 5-4 vote, avoided the constitutional questions by declaring the case moot because a ruling on the issues would have no effect on the plaintiff.[17]

Four years later the question of the constitutionality of affirmative action programs was back before the court in University of California Board of Regents v. Bakke, a case challenging a minority set-aside program at the medical school at the University of California at Davis.[18] Allan Bakke, who was 38 years old and had been denied admission twice, sued the university. He argued that the school's policy of allocating a percentage of its class positions to minorities, some of whom were less qualified than he, denied him equal protection.

The case was settled on a 5-4 vote. Justice Powell's vote, when combined with each of two four-vote blocks, established the legal rules in the case. First, Powell joined with four justices who resolved the case without addressing the constitutional issues by invoking the Title VI Civil Rights of 1964.[19] Title VI prohibits discrimination in programs receiving federal funding on the basis of race, color and national origin. The justices reasoned that the medical school's minority policy violated Title VI because it was based solely on race. Powell, in his concurrence, went a step further. He reasoned that the Title VI prohibition and the equal protection clause of the 14th Amendment were both controlling, therefore raising a constitutional issue.

Powell reasoned that race-based classifications were not always unconstitutional, but that to pass muster, a state must ". . . demonstrate that the challenged classification is necessary to promote a substantial state interest."[20] He said the university's goal of remedying past societal discrimination was not sufficient to overcome this burden.

Powell agreed that the university's set-aside program was unconstitutional, but he did not believe that all race-aware programs were impermissible. While the four remaining justices favored broad remedial programs to offset the general effects of years of discrimination, Powell would limit such programs to instances where past discrimination could be documented. Powell's reasoning, combined with the four dissenting justices, established the rule that government could establish a substantial interest in race-conscious programs where evidence of past discrimination existed.

Five years later, in United Steelworkers of America v. Weber, the court held that a voluntary training program favoring minorities did not violate Title VII of the Civil Rights Act of 1964.[21] The case arose after Weber, a white worker, challenged a program at a Kaiser Aluminum plant. The plant, in concert with the United States Steelworkers, voluntarily set aside half of the positions in an in-house training program for minorities. Weber, who had more seniority than some employees in the program, claimed he was the victim of reverse discrimination, a position supported by the lower courts.

The Supreme Court, on a 5-2 vote, upheld the voluntary program. Justice Brennan, joined by the three other dissenters from Bakke along with Justice Stewart, reasoned that Congress did not intend for Title VII of the Civil Rights Act to preclude private employers from voluntarily setting up programs to create opportunities for minorities that had not previously existed.

Brennan noted that in Title VI, Congress was attempting to ". . . legislate to ensure that federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the Commerce power to regulate purely private decisionmaking and was not intended to incorporate or particularize the commands of the Fifth and Fourteenth amendments,"[22] which prohibit state and federal infringement.

A year after Weber, the court upheld a federal program that set aside a percentage of contracts for minority-owned businesses. In Fullilove v. Klutznick,[23] the court said the provision of the Public Works Employment Act of 1977 did not violate the Constitution. The program was upheld on a 6-3 vote, but there was no majority opinion. Chief Justice Burger, writing for himself and Justices White and Powell, said "Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures."[24]

In 1984, the court held that affirmative action could not be used to protect recently hired blacks from layoffs when they themselves had not been the victims of past discrimination. In Firefighters Local Union No. 1784 v. Stotts,[25] the court rejected a plan by a federal judge to minimize the effects of budget cutbacks on blacks recently hired under a consent decree to settle charges of racial discrimination. Under the plan, whites with more seniority were laid off ahead of more recently hired blacks.[26]

Justice White, writing for himself and four other justices, said the federal judge had exceeded his authority when he authorized a layoff plan that violated the fire department's seniority rules.[27] In addition, White reasoned that Congress had intended affirmative remedies in the 1964 Civil Rights Act to apply only to persons who themselves had been victims of illegal discrimination, not to minorities in general. The court held that the lower court's order was unfounded since none of the newly hired black firefighters claimed individual discrimination.[28]

The Supreme Court reinforced this reasoning in Wygant v. Jackson Board of Education two years later.[29] In Wygant, the court on a 5-4 vote held that the school board's policy of laying off white teachers to preserve jobs of more recently hired blacks was unconstitutional.[30] Again, the court reasoned that the school board's policy was not based on any evidence of past discrimination by the board.[31] Justice Powell noted that affirmative programs were necessary and that: "As part of this nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden."[32] But Powell felt the burden too great when a policy would "deprive people of their existing jobs."[33]

In 1986, the court upheld two affirmative action programs involving minority union membership quotas and race-based job promotions. In Local No. 28 of the Sheet Metal Workers' International v. Equal Employment Opportunity Commission,[34] the court on a 5-4 vote upheld a court order requiring minority quotas for union membership.[35] In the related case, Local No. 93, International Association of Firefighters v. City of Cleveland,[36] the court voted 6-3 to uphold a job promotion agreement in the Cleveland fire department.[37] The court said that the Civil Rights Act did not prevent the city of Cleveland from settling a hiring-bias complaint by agreeing to promote one black for every white promoted.[38]

The following year, the court upheld a similar Alabama program designed to ensure the promotion of more black state troopers. In United States v. Paradise,[39] the court voted 5-4 to uphold a promotion quota plan that required one black promotion for every white promotion.[40] Writing for the majority, Justice Brennan emphasized Alabama's "long and shameful record of delay and resistance."[41] Brennan noted that a federal judge had instituted the one-for-one quota system when he found that 11 years after the department was sued for discrimination, racial discrimination was still rampant.[42]

That same year, the court also upheld a voluntary affirmative action program designed to increase the number of women in higher-level positions in the Santa Clara County [California] Transportation Department. In Johnson v. Transportation Agency, Santa Clara County,[43] the court voted to apply the reasoning of Weber to public as well as private employers.[44] Justice Brennan, writing for the 6-3 majority, said ". . . such a plan is fully consistent with Title VII for it embodies the contributions that voluntary employer action can make to eliminating the vestiges of discrimination in the work place."[45] Brennan reasoned that in Johnson, as in Weber, the temporary program did not require that white men be fired so minorities might be promoted, nor did it preclude advancement by white males.[46]

In 1989, the conservative drift of the court became apparent in a case that struck down a quota program in Richmond, Virginia, that was similar to the federal program upheld by the court in _Fullilove_. The Richmond program required general contractors on all city public works projects to set aside 30 percent of their subcontracted work for minority contractors.[47] The J.A. Croson Co., a would-be contractor, challenged the program.[48] The contractor maintained it was unsuccessful in winning a city plumbing contract because it was unable to find a qualified minority subcontractor.[49] In _City of Richmond v. J.A. Croson Co._,[50] the court held that states, unlike Congress, do not have the broad power to enforce the 14th Amendment.[51] It followed, the court reasoned, that _Fullilove_ was not applicable to state and city minority set-aside programs.[52]

Justice O'Connor, writing for the 6-3 majority, said that states may take remedial action only "when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination,"[53] and the states "must identify that discrimination, public or private, with some specificity before they can use race-conscious relief."[54] She added that this required "proper findings . . . to define both the scope of the injury and the extent of the remedy necessary to cure its effects. . ."[55] O'Connor worried that allowing programs based on nebulous claims of past discrimination might open a floodgate.

She said:

> "To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently immeasurable claims of past wrongs."[56]

In 1989, the court also suggested that third parties, who felt they had been injured by affirmative action plans, could challenge such plans after the plans' adoption. In _Martin v. Wilks_,[57] Chief Justice Rehnquist, writing for a 5-4 majority, said the court should allow such challenges on the principle that an individual should not be deprived of due process rights as the result of a proceeding in which he was not a party.[58]

III. THE FEDERAL COMMUNICATION COMMISSION AND PROGRAMMING DIVERSITY

Foundation for Federal Regulation of Broadcasting

In 1927, Congress asserted authority over the broadcasting industry when it passed the Radio Act.[59] The act authorized creation of the Federal Radio Commission (FRC), an independent regulatory agency to decide who should receive broadcast licenses.[60] The act reasoned that government regulation of broadcasting was warranted and necessary because of the physical limitations of the broadcast spectrum; only a limited number of frequencies were technically possible, so government should decide how this finite public resource would be used.[61] The act said no individual or business could claim ownership or the right to permanent use of the airwaves because they were a public resource.[62] Recognizing that only a limited number of broadcast frequencies were available, Congress said it had a duty to ensure fairness in allocating licenses and in the orderly development of this public resource.[63]

In 1934, Congress passed the Federal Communications Act. The act established the Federal Communications Commission (FCC) to replace the FRC.[64] The new agency was charged with ensuring that the public airwaves were used in the "public interest, convenience and necessity."[65] In addition, Congress gave the FCC the authority to establish the qualifications for station operators and to issue licenses to qualified applicants.[67]

During congressional hearings preceding the Federal Communications Act, legislators emphasized that despite the proposed act's restrictions on government censorship of broadcasting content, the content of programming should be a factor in determining whether a licensee was using the station in the public interest.[68] In 1931, the U.S. Court of Appeals for the District of Columbia had endorsed this reasoning by upholding a decision by the Federal Radio Commission to deny renewal of a license because of the content of the station's broadcasts.[69] A year later, the same court said that the Radio Commission acted within its authority when it denied renewal to a licensee.[70] The court held that denial based on defamatory and racist programming did not violate the First Amendment.[71] The Program Diversity Rationale

In 1965, the FCC issued a policy statement addressing the comparative hearing process -- the process by which the FCC selects one applicant for a new broadcast license over others.[72] The policy statement articulated two objectives in the comparative hearing process. The first was to provide optimum service in the public interest. The second was to ensure maximum diffusion of control of the broadcast industry. The FCC emphasized that its mandate to serve the public interest required consideration of both objectives in order to provide for diversity in information. The public interest mandate also required the FCC to promote diversity in station ownership.[73] The nexus between diversity in ownership and the diversity of information broadcast over the public airwaves has been recognized both by Congress and the courts.[74] This diversity rationale -- that a greater flow of diverse ideas and information will benefit society generally -- forms the foundation for two FCC policies aimed at bringing more minority ownership into the broadcasting industry. The first is the minority merit policy, which gives additional weight to applications by minorities during the comparative hearings for a new broadcast license; the second is the FCC's distress sale policy, which allows minority license aspirants, who meet certain qualifications, to purchase broadcast properties in danger of losing their licenses prior to the beginning of the comparative renewal process.

The minority merit policy

The FCC has promoted the minority merit policy in comparative hearings since 1972. The FCC adopted the policy after the U.S. Court of Appeals for the District of Columbia's decision in TV 9 Inc. v. FCC.[75] In that case, the D.C. Circuit held that when the awarding of a license to a minority applicant would likely lead to an increase in diversity of viewpoints, a merit factor should be awarded to the minority applicant in the comparative hearing process.[76] The court recognized the "connection between diversity of ownership and diversity of ideas and expression required by the First Amendment."[77] Alluding to the importance of the role of the "gatekeepers" in the determination of media content, the court noted:

> "The fact that other [licensee] applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news."[78] (Emphasis added.)

The court also would award a merit factor if the minority ownership interest were integrated into the management of the operation.[79] In other words, merit would be awarded if the minority owner also intended to take an active role in the management of the broadcast property.

In TV 9, the D.C. Circuit rejected the FCC's argument that the race of an applicant could not be taken into account in the awarding of licenses because the Communications Act of 1934, like the Constitution, is colorblind.[80] The court noted that the FCC's public interest mandate was not limited solely to the FCC policy statement, but should be applied broadly to encompass other potential affirmative actions.[81] The court also said that an advance showing that merit awards would lead to increased diversity was not necessary.[82] A "reasonable expectation" of programming diversity was sufficient, the court said.[83]

The D.C. Circuit underscored its holding in TV 9 ten years later in West Michigan Broadcasting Co. v. FCC,[84] a case involving competing broadcast license applicants with similar management qualifications. In West Michigan Broadcasting, the court held that the agency properly granted minority merit in choosing an applicant because of its minority status and its integration into management.[85] The non-minority applicant argued that since the contested license covered a predominantly white broadcast coverage area, minority merit should not be awarded during the comparative hearing.[86] The court, however, rejected the rationale that minority merit was a function of the race of the potential audience.[87] In doing so, the court recognized that the FCC's goal of viewpoint diversity was a national, not only a local, standard.[88]

In addition, the court underscored the validity of the FCC's goal of increased minority ownership by emphasizing the gross underrepresentation of minorities in the broadcast industry.[89] Since the FCC adopted the minority merit policy following the TV 9 case,[90] both Congress[91] and the courts[92] have accepted minority ownership as a significant objective within the FCC's public interest mandate.

The Distress Sale Policy

The FCC, concluding that there remained "a dearth of minority ownership in the broadcast industry,"[93] enacted the distress sale policy in 1978 in a further effort to bring minorities into broadcast station ownership and management to enhance diversity of programming.[94] The FCC explicitly accepted the assumption that "full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programs."[95] The distress sale policy was established after the agency determined that its efforts to bring more minorities into the broadcasting industry -- no matter how well-intentioned -- were not achieving their goals.[96]

In the Minority Ownership Policy Statement, the FCC conceded that despite ongoing programs and policies to increase minority participation ". . . an extreme disparity between representation of minorities in our population and in the broadcasting industry requires further Commission action."[97] The policy statement noted that:

> "While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of minorities continue to be inadequately represented in the broadcast media. . . . Adequate representation of minority viewpoints in programming serves not

only the needs and interests of the minority community, but also enriches and educates the non-minority audience."[98]

The distress sale policy encourages broadcast licensees whose licenses have been designated for a revocation hearing, before the start of a hearing, to seek out and sell their stations to minority-owned or controlled entities at a price "substantially below its fair market value."[99] A licensee whose license had been designated for hearing ordinarily would be prohibited from selling, assigning, or otherwise disposing of its interests until the issues had been resolved in the licensee's favor.[100]

In addition to bringing minorities into the broadcast industry, the distress sale policy serves two other objectives. First, it attempts to encourage licensees in danger of losing their licenses to seek out minority interests before initiation of the comparative renewal process, which often is long and costly. This addresses the concern that potential minority buyers lack adequate information about license availability.[101] Second, the policy addresses the concern that minority enterprises lack the financial resources necessary to compete in the license acquisition process, by encouraging the sale of distressed properties at a reduced price. This, in effect, gives minority buyers without adequate access to capital a financial advantage and increases the likelihood of minority ownership.[102]

The FCC Shifts Its Position

In 1986, the FCC adopted a Notice of Inquiry to consider the legality of its policies to achieve diversity in broadcast programming with race- and gender-based programs.[103] The proceedings were prompted by the FCC's concerns about the U.S. Court of Appeals for the D.C. Circuit's ruling in Steele v. FCC[104] and several U.S. Supreme Court cases dealing with race-conscious programs.[105]

In Steele, a divided three-judge panel held that the FCC's gender preference policy was invalid because it exceeded the FCC's statutory authority.[106] The opinion stated that the assumptions underlying the FCC's minority preference policies "run counter to the fundamental constitutional principle that race, sex and national origin are not valid factors upon which to base government policy."[107] The court added that the FCC:

> ". . . has been unable to offer any evidence other than statistical underrepresentation to support its bald assertion that more women station owners would increase programming diversity. Instead, a few Commission employees without any evidence, reasoning, or explanation, gratuitously decreed one day that female preferences would henceforth be awarded . . . Presumably, the Board thought it was a good idea and would lead to a Better World. Contrary to the Commission's apparent supposition, however, a mandate to serve the public interest is not a license to conduct experiments in social engineering conceived seemingly by the whims and rationalizations by conclusory dicta."[108]

The full D.C. Circuit granted a rehearing of the case and vacated the panel's holding.[109] In a subsequent order, the full circuit asked the various parties to file briefs addressing the FCC's statutory authority to establish gender-based preference policy and the constitutionality of such policies.[110]

In response, the FCC filed a brief questioning whether its present gender and race preference policies were on solid constitutional and statutory footing. The commission was concerned because it had never held proceedings to determine whether there existed a sufficient factual nexus between its preference policies and enhanced diversity. To remedy this lack of a factual basis for its policies, the FCC asked that the case be remanded so it could hold such proceedings.[111] The FCC adopted the 1986 Notice of Inquiry to address the concerns expressed in Steele v. FCC and to review its policies in relation to several Supreme Court affirmative action cases the agency said "may implicate the Commission's" minority preference policies.[112] In doing so, the FCC noted that:

> "Although these cases are primarily concerned with quota or set-aside affirmative action remedies for past discrimination, collectively these cases at a minimum establish the proposition that classification based on race or sex are inherently suspect, presumptively invalid, and subject to strict or heightened scrutiny."[113]

The FCC noted that program diversity was the rationale for its minority preference policies, and that it viewed program diversity as a substantial government interest within the commission's authority. The Supreme Court had not intended to foreclose every application of minority or gender status to government programs, the FCC reasoned. However, the FCC concluded that such programs required a determination whether their use was both necessary and narrowly tailored to achieve their goals. Such programs, the FCC concluded, must not be based on the assumption alone that minority involvement in broadcast ownership will result in greater program diversity. Instead, the FCC said, it would conduct an inquiry to re-examine the legal and factual basis for its policies and to determine whether a sufficient relationship exists between its policies and broadcast diversity and whether such policies were necessary to achieve the goal.[114]

In the 1986 Notice of Inquiry, the FCC asked responding parties to address three sets of questions. First, the FCC asked, to what extent had the distress sale and minority merit policies led to the increased entry of minorities and women into the broadcasting industry? What percentage of stations had been acquired under these policies? Was there anything in the comparative hearing process that acted as a barrier to minorities and women? How long had minorities and women who benefited from the policies retained ownership?[115]

Second, the FCC asked, what were the major barriers to minority ownership in the broadcast industry? Did access to financing capital continue to be a problem? To what extent was lack of information about ownership possibilities a problem? What role might the FCC play in eliminating these and other extrinsic policies?[116]

Third, the FCC asked what social costs might result from continuing these policies. Were the benefits outweighed by the social costs of such programs?[117] The FCC abandoned the inquiry in January 1988 after the president signed into law House Joint Resolution 395, which contained appropriation legislation for the commission for the 1988 fiscal year.[118] The legislation, which appropriated funds for FCC personnel and expenses, expressly forbade that appropriated funds:

> ". . . be used to repeal, to retroactively apply changes in, or to continue the re-examination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted . . . to expand minority and women ownership of broadcasting licenses."[119]

IV. THE SUPREME COURT'S RATIONALE

In June 1990, the Supreme Court in *Metro Broadcasting* reversed a trend of the Rehnquist Court that had suggested troubled waters ahead for all affirmative action programs.[120] An underlying question in *Metro Broadcasting* had been whether the court, given its recent decision striking down a municipal set-aside plan, would abandon its precedent in *Fullilove*, which gave more latitude to federal policies than those at the state and local level.[121] The reasoning of *Fullilove* prevailed, and the court upheld the two key Federal Communications Commission programs aimed at increasing minority representation in the broadcast industry. Writing for the 5-4 majority in *Metro Broadcasting*, Justice Brennan noted that it "is of overriding significance in these cases that the minority ownership programs have been specifically approved -- indeed, mandated -- by Congress."[122]

Brennan anchored the opinion on the strength of congressional support for the two policies and in the FCC's historic role in promoting broadcasting diversity. Rejecting the need to apply strict constitutional scrutiny in "benign race-conscious measures," Brennan opted for a lesser standard of review.[123] He said that Congress need only demonstrate that its objective is important, rather than compelling as a strict scrutiny analysis would require. Brennan said race-conscious programs mandated by Congress, even if not designed to compensate victims of past governmental or societal discrimination, can pass constitutional muster if ". . . they *serve important governmental objectives* within the power of Congress and *are substantially related to achievement of those objectives*." (Emphasis added)[124] Brennan, borrowing language from various justices in *Fullilove*, adopted this two-step test for benign race-conscious policies.

Important Government Interest: Broadcast Diversity

In *Metro Broadcasting*, Brennan concluded that the two FCC policies satisfied the first prong of the test for benign race-conscious federal programs. The opinion reasoned that both

Congress and the FCC had recognized the important and long-standing government interest in achieving diversity in broadcasting. Both Congress and the FCC had long recognized that fostering broadcast diversity was the primary duty of the commission under its mandate to ensure the airwaves were used in the public interest, the opinion said.[125]

The opinion noted that Congress and the FCC established the policies to correct "the effects of past inequities stemming from racial and ethnic discrimination" that have "resulted in a severe underrepresentation of minorities in the media of mass communications."[126] It said that the minority preference polices were not designed to aid victims of past government discrimination, but instead were designed to further the long-standing and clearly articulated objective of broadcast diversity.[127]

This goal of broadcast diversity, the court reasoned, is grounded in the First Amendment rights of the broadcast audience; the rights of the viewers and listeners to receive information are paramount to those of broadcast licensees, whose access to the public airwaves is a government-given privilege, not a right.[128] "Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission," the court said.[129]

Policies Substantially Related to Broadcast Diversity

Brennan's opinion concluded that the FCC's distress sale and minority merit policies also satisfied the second prong of test for benign race-conscious programs -- that the policies be substantially related to the achievement of their objectives. It observed that both Congress and the FCC have determined that the agency's minority ownership policies are substantially related to the goal of broadcast diversity.[130] The opinion applied "great weight to the decisions of Congress and the experience of the Commission," emphasizing Congress' fact-finding role and the agency's expertise in policy-making.[131] The opinion said that the FCC has determined that minority participation in broadcasting promotes programming diversity. It cited a 1978 FCC policy statement that concluded that "ownership of broadcasting facilities by minorities is [a] significant way of fostering the inclusion of minority views in the area of programming" and that "full minority participation in the ownership and management of broadcasting facilities results in a more diverse selection of programming."[132]

In addition, the opinion pointed out that the FCC's policies are consistent with the fundamental assumption of the Communications Act of 1934 that diversification of ownership will broaden the range of programming available to the broadcast audience.[133] Thus, the court reasoned, "it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news."[134]

The opinion also pointed out that the FCC has never relied on market forces alone to ensure that the needs of the audience are met.[135] If the FCC had traditionally relied on market forces, the opinion observed, the agency would have had little need to weigh such factors as ownership integration, local residency and civic participation of license aspirants during the licensing process.[136]

The opinion underscored the fact that Congress had made clear its endorsement of the relationship between the FCC's minority policies and the goal of programming diversity. The opinion noted that on several occasions Congress expressly addressed the relationship between the FCC's minority policies and the goal of broadcasting diversity. In 1969, for example, Congress considered legislation to eliminate comparative renewal proceedings. During hearings, witnesses told Congress that comparative hearings provided an opportunity for groups traditionally excluded from the license-acquisition process -- particularly minorities -- to gain entry into the broadcasting field.[137] The legislation failed.

Congress also addressed the issue in 1973 and 1974, when committees held hearings on proposals to extend the license renewal period from every three years to every five years and to revamp the comparative hearing process. Testimony again emphasized that renewal hearings provided an opportunity for minorities to gain entry into the broadcasting industry. Neither proposal was enacted.[138] Congress considered a bill in 1978 to deregulate the broadcast industry. Among other things, the bill would have replaced the comparative hearing process with a lottery system for allocating broadcast licenses. It also would have established a fund to assist minorities who sought broadcast licenses. According to the bill's sponsor, the legislation assumed "that the most effective way to reach the inadequacies of the broadcast industry in employment and programming would be doing something at the top, that is, increasing minority ownership and management and control in broadcast stations."[139] As a result of executive branch misgivings, the lottery bill failed. In 1981, the opinion noted, Congress again held hearings that ultimately led to legislation assigning licenses for low-power television stations by lottery. During hearings, Congress affirmed its belief in the relationship between minority ownership and broadcasting diversity. Congress emphasized that this relationship "has been repeatedly recognized by both the [FCC] and the courts."[140]

Brennan's reasoning focused on the FCC's attempt to revisit its minority preference policies in 1986, which brought a swift response from Congress. A House subcommittee holding hearings on the FCC's inquiry into the validity of its minority policies stated that the "most important message of this hearing today is that the commission must not dismantle these long-standing diversity policies, which Congress has repeatedly endorsed, until such time as Congress or the courts direct otherwise."[141] In addition, several bills attempting to codify the FCC's minority preference policies were introduced in Congress.[142] Congress ultimately headed off the FCC's attempt to reconsider its minority preference policy by passing legislation prohibiting any funding for such an inquiry. A report from the Appropriations Committee, which initiated the legislation, stated that "Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences."[143]

V. A TENUOUS VICTORY FOR AFFIRMATIVE ACTION

Joining Brennan in the Metro Broadcasting majority were the court's three other liberals (Justices Marshall, Blackmun and Stevens) and Justice White, who had voted with a different 5-4 majority in Richmond to overturn that city's minority set-aside program. White, 21 years before Metro Broadcasting, had written a landmark broadcasting opinion in Red Lion v. FCC.[144] In that opinion, White concluded that receipt of a broadcasting license was a privilege, not a right. White put the First Amendment rights of the broadcast audience to receive information ahead of the First Amendment rights of the broadcaster, who used the public airwaves under a government grant of privilege. In Metro Broadcasting, Brennan followed that reasoning. He said that the public interest served by the use of the airwaves to ensure diversity of viewpoints was superior to the right of any would-be broadcaster, who sought the privilege to use the public airwaves.

To pull together a majority, Brennan needed a fifth vote. By adopting White's reasoning in Red Lion as justification for the FCC's broadcast diversity policies, Brennan may have been attempting to draw him into the liberals' ranks, with which he ultimately voted. Brennan's opinion also rested squarely on the principle that the court owed a special deference to Congress when the legislative branch's intentions were strong and clear and when it acted within its lawmaking powers. Here, too, Brennan may have been playing to White. Harvard Law Professor Charles Fried, who served as solicitor general in the Reagan administration, noted White's strong deference to Congress in the wake of Metro Broadcasting. "Congress looms very large in White's jurisprudence. . . . He almost seems to yearn for a parliamentary democracy," Fried said.[145] This assessment of White was echoed by Georgetown law professor Louis M. Seidman, who noted that "White has long had the view that Congress can do many things (under the Constitution) that states cannot do."[146]

By grounding much of his reasoning in deference to Congress, Brennan reaffirmed the legal rule of Fullilove that the federal government has more leeway in implementing benign race-conscious affirmative actions programs. The ruling also made clear that the reasoning of Richmond was limited to non-federal programs. Taking a position never before supported by a majority of the court, Brennan's opinion also stated that policies aimed at future societal benefits, not just at remedying past discrimination, could be constitutional.[147]

However, Brennan's reliance on Red Lion, which focused on the special relationship of broadcasters to the regulatory process, may provide a point of distinction that a future court -- absent Brennan, Marshall and possibly other liberal justices of advanced years -- might use to distinguish its case and reach an opposite conclusion. The FCC, given the mandate to issue licenses and to ensure that the airwaves were used in the public interest, has long had leeway to make such judgments on the basis of often-subjective criteria. The policies of an agency without that kind of historical prerogative, and policies without the long-standing Congressional endorsement that the FCC's diversity goal enjoys, might not receive the same deference from a future court.

The four dissenters in Metro Broadcasting made clear their rejection of the two FCC policies and of Brennan's more accommodating test for such benign race-conscious programs. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, would have applied strict scrutiny -- requiring that the policies be necessary and narrowly tailored to achieve a compelling governmental interest. The dissenters maintain that the FCC policies provide benefits to some members of society at the expense of others in violation of constitutional equal protection.[148] They also rejected the majority assertion that such policies require a lesser standard of judicial review because Congress consistently supported the policies.[149]

In addition, the dissenters rejected the majority's view that racial-preference programs could be applied when there was no evidence of identifiable past discrimination. Citing Fullilove, the dissenters distinguished that case from Metro Broadcasting because in the former, Congress had identified discrimination that had specifically affected the construction industry and had carefully fashioned corresponding remedial measures.[150] Applying what they saw as the proper standard of review -- strict scrutiny -- the dissenters concluded that the only compelling interest the court should recognize was past discrimination. Increasing diversity of viewpoints was just "too amorphous,"[151] they concluded.

Given these sentiments, and the fact Brennan was replaced by a conservative and liberal Justice Thurgood Marshall is retiring from the court, the precedent value of *Metro Broadcasting* outside the heavily regulated broadcast industry is arguable. So, too, is the case's application to affirmative action in general, given the narrow majority in *Metro Broadcasting*, the clarity of the dissent, and the doctrinal swing of the court.

It seems likely that new legal challenges to the process of awarding lucrative broadcast licenses will arise and that the minority preference policies of a reluctant FCC will again come before the court. Or other non-broadcasting cases might arise, which deal with policies that lack the FCC's historical prerogative or the strong evidence of long-standing congressional endorsement. The strength of concern among the four dissenters in *Metro Broadcasting* suggests that the necessary votes exist to bring the issue back before the court.

The lasting effect of the affirmative action victory of *Metro Broadcasting* appears tenuous at best.

* * *

FOOTNOTES

1. Washington Journalism Review, July/August 1990 at 44.

2. Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. sec. 151-610. The act assigned to the Federal Communications Commission the responsibility to assign broadcast licenses based on the "public interest, convenience and necessity."

3. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1956), recon. denied, 1 F.C.C.2d 918 (1965). See also In the Matter of the Amendment of Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C 288, 291. The FCC notes that the "vitality of our system of broadcasting depends in large part on the introduction into this field licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service. Simply stated, the fundamental purpose of . . ownership in order to maximize diversification of program and service viewpoints as well as prevent any undue concentration of economic power contrary to the public interest."

4. The FCC defines "minority" as "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction. See Minority Ownership and Broadcasting Facilities, 68 F.C.C.2d 979, 980 n. 8. The FCC also has applied its minority policies to women. See Mid-Florida Television Corp., 69 F.C.C.2d 652 (Rev.Bd. 1978).

5. See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 851.

6. See Cullen, Mass Media and the First Amendment at 297. The author defines media "gatekeepers" are persons in positions of authority who decide the content of their particular medium. Studies of such "gatekeepers," the author notes, have shown that much of the information that is discarded -- never printed or broadcast -- is important to some members of society. This is particularly acute in the area of non-entertainment programming, where so little air time is available.

7. The "distress sale" policy allows broadcasting licensees whose licenses have been designated for revocation hearing, prior to commencement of a hearing, to sell their stations to a minority-owned or controlled entity, at a price "substantially" below fair market value. A licensee whose license has been designated for hearing ordinarily would be prohibited from selling, assigning or otherwise disposing of its interests, until the issues have been resolved in the licensee's favor. See 92 F.C.C.2d at 851, note 5 supra.

8. Shurberg Broadcasting, Inc. v. FCC, 876 F.2d 902 (1989).

9. See Re-examination of the Commission's Comparative Licensing, Distress Sale and Tax Certificate Polices Premised on Racial, Ethnic or Gender Classification, 1 F.C.C.2d 1315 (1986), para. 8. The FCC notes that it responded to an order in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985) for parties to file briefs addressing the commission's statutory authority to grant gender-based preferences and whether the policy was constitutional. The FCC notes that it responded with a brief that "expressed concerns that both the female and minority preference policies do not satisfy statutory or constitutional requirements."

10. In *TV 9 v. FCC*, 495 F.2d 929, 941. (D.C. Cir. 1973), the court explained the term "minority merit." The court explained that the FCC grants *preference* when it determines that one applicant's qualifications are better than another's. "*Merit*," the court said, occurs when an applicant shows positive qualities that do not necessarily result in preference. In other words, merit is one "plus factor" to be considered when the FCC determines whether an applicant should have preference.

11. *Winter Park Communication, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989).

12. *Id*.

13. *Astroline Communications Co. Ltd. Partnership v. Shurberg Broadcasting*, 110 S.Ct. 715 (1990), *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 715 (1990).

14. *Metro Broadcasting, Inc. v. FCC, Astroline Communications Co. v. Shurberg Broadcasting*, 110 S.Ct. 2997 (1990).

15. *Id*.

16. A policy or program for correcting the effects of discrimination in the employment or education of members of certain groups, as women, blacks, etc. *Webster's New World Dictionary, Second College Edition*, at 23.

17. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

18. *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

19. Title VI of the Civil Rights Act of 1964. Get cite.

20. *Bakke* at 307, 320. (ck this one)

21. *United Steelworkers of America v. Weber, Kaiser Aluminum & Chemical Corp. v. Weber, United States v. Weber*, 438 U.S. 193 (1979).

22. *Id*. at 206 n. 6.

23. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

24. *Id*. at 490.

25. *Firefighters Local Union No. 1784 v. Stotts*, 465 U.S. 561 (1984).

26. *Id*.

27. *Id*.

28. *Id*..

29. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)

30. *Id*. at 267.

31. *Id*. at 268.

32. *Id*. at 280-281.

33. *Id*. at 282.

34. *Local No. 28 of the Sheet Metal Workers' International v. E.E.O.C.*, 478 U.S. 421 (1986).

35. *Id*. at 421.

36. *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

37. *Id*. at 501.

38. *Id*. at 528.

39. *United States v. Paradise*, 480 U.S. 149 (1987).

40. *Id*. at 149.

41. *Id*. at 185.

42. *Id*. at 149.

43. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

44. *Id*. at 625.

45. *Id* at 641.

46. *Id*. at 630.

47. *Id*. at 469.

48. *Id*.

49. *Id*.

50. *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989).

51. *Id*. at 490.

52. *Id*. at 477.

53. *Id*. at 504.

54. *Id*.

55. *Id*. at 510.

56. *Id* at 505.

57. *Martin v. Wilks*, 109 S.Ct. 2180 (1989).

58. *Id*. at 2182.

59. Radio Act of 1927, 44 Stat. 1162-65, 1168 (1927).

60. *Id*.

61. *Id*.

62. *Id*.

63. *Id*.

64. Federal Communications Act of 1934, 48 Stat. 1064.

65. *Id*.

66. *Id*. See also *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943) stating that standard provided by 47 USCA sec. 161 is public interest, convenience and necessity.

67. *Id*.

68. See 68 Cong. Rec. 4,111 (1927).

69. *KFKB Broadcasting Ass'n Inc. v. FRC*, 47 F.2d 670 (D.C. Cir. 1931).

70. *Trinity Methodist Church, South v. FRC*, 62 F.2d 850 (D.C. Cir. 1932).

71. *Id*.

72. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

73. Report and Order, 18 F.C.C. 288 (Rev.Bd. 1953).

74. See House Conf. Rep. No. 765, 97th Cong., 2nd Sess. 40 in U.S. Code Cong. & Admin. News 2237, 2284. See also *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969), *Associated Press v. U.S.*, 326 U.S. 1 (1945).

75. *TV9 v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), cert. den., 418 U.S. 986 (1974).

76. A minority merit factor is assigned when the party seeking the property is a minority.

77. *TV9* at 937-938.

78. *Id*. at 938.

79. *Id*.

80. *Id*.

81. *Id*.

82. *Id*.

83. *TV9* at 1063. See also *Garnett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975). In *Garnett*, the court notes that "The entire thrust of *TV9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that reasonable expectation without 'advance demonstration' gives them relevance."

84. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

85. *Id*.

86. *Id*. at 609.

87. *Id*.

88. *Id*. at 611.

89. *Id*.

90. See *TV9*, note 75 *supra*.

91. H.R. Conf. Rep. No. 765, 97th Cong., 2nd Sess. 44-45, reported in U.S. Code Cong. & Adm. News 2288-89, (1982).

92. See *Western Michigan*, note 61 *supra*.

93. Minority Ownership of Broadcasting Facilities at 981.

94. *Id*. at 979.

95. Id. at 981.

96. Id.

97. Id. at 982.

98. Id. at 980.

99. Minority Ownership In Broadcasting at 851.

100. Id.

101. Metro Broadcasting at 4; See also Re-examination of the Commission's Comparative Licensing, Distress Sale and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classification, para. 19 (b); Policy Regarding Advancement of Minority Ownership in Broadcasting, Gen. Doc. No. 82-797, 92 F.C.C.2d 849 (1982).

102. Id.

103. Re-examination of the Commission's Comparative Licensing, note 77, supra.

104. Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985).

105. Re-examination of the Commission's Comparative Licensing, para. 13, note 79 supra.

106. Steele at 1199.

107. Id. at 1198.

108. Id. at 1199.

109. Steele v. FCC, 806 F.2d 1126 (1986).

110. Id.

111. Steele v. FCC, No. 84-1176, pet. for remand.

112. Id.

113. Id.

114. Re-examination of the Commission's Comparative Licensing, supra note 101.

115. Id. See note 77, supra.

116. Id.

117. Id.

118. Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub. L. No. 100-202 (Signed Dec. 22, 1987)

119. Id.

120. See note 9 supra., in which the FCC questions its race-conscious policies on the basis of, among other things, recent Supreme Court opinions.

121. See Richmond, note 39 supra., in which the court struck down a municipal minority set-aside program.

122. Metro Broadcasting at 3008.

123. Id. at 3008-3009.

124. Id. at 3009.

125. Id. at 3010.

126. Id.

127. Id.

128. Id.

129. Id.

130. Id. at 3011.

131. Id.

132. Id. citing 68 F.C.C.2d at 981.

133. Id. at 3012.

134. Id.

135. Id. quoting TV 9, 495 U.S. 938.

136. Id. See also Fowler & Brenner, "A Marketplace Approach to Broadcast Regulation," 60 Texas L. Rev. 207 (1982). Fowler, FCC chairman under the Reagan administration until 1987, wanted to eliminate programming regulation altogether. He rejected the underlying assumption of the Communications Act that broadcasters were public trustees who had a duty to provide programming in the public interest. Fowler preferred a market-driven approach to broadcasting content in which the "public's interests, then, determine the public interest." The Supreme Court endorsed the concept of broadcasters as public trustees of the airwaves in Red Lion Broadcasting v. FCC, note 120 infra. The court has not abandoned that view, as Brennan's opinion in Metro Broadcasting affirms.

137. Id. at 3013.

138. Id.

139. Id. at 3014.

140. Id. at 3015.

141. Id.

142. Id.

143. Id. at 3016.

144. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

145. Lewis, "High Court Ruling May Free Federal Affirmative Action Programs from Challenge," The New York Times, , July 3, 1990.

146. Savage, "Rehnquist Court Left Laws in Hands of States, Cities," The Los Angeles Times, June 30, 1990.

147. Metro Broadcasting at 3026.

148. Id. at 3029.

149. Id. at 3030.

150. Id. at 3031.

151. Id. at 3035.

THE LEGACY OF *HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER*: THE SUPREME COURT FURTHER NARROWS FIRST AMENDMENT PROTECTION OF STUDENT EXPRESSION IN PUBLIC SCHOOLS

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Assocation for Education in Journalism and Mass Communication
Annual Convention, Boston, Massachusetts, August 1991

With its January, 1988 holding that a Missouri high school principal did not violate the First Amendment when he deleted from a school-sponsored student newspaper pages containing articles he reasonably considered objectionable, the Supreme Court of the United States did more than alter the legal context in which scholastic publications are produced. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), left student journalists, educators, and administrators, both inside and outside of Hazelwood East High School, wondering how to re-define their roles in the process of operating a school press. Nevertheless, the rulings' more enduring legal legacy may be as precedent in determining when and how a public forum is created by a school and to what extent an educator has authority to control school-sponsored expressive activities that may be interpreted as having school endorsement.

The Kuhlmeier decision marked an additional limitation in the scope of Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), which had declared students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id. at 511. The Tinker court said in its decision that students who wore arm bands to protest the Vietnam War could not be punished merely for expressing their personal views on school premises unless school authorities had reason to believe that such expression would "substantially interfere with the work of the school or impinge upon the rights of other students." Id. at 509. Tinker was narrowed in a decision issued two years before Kuhlmeier when the Supreme Court declared that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings." Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). In Fraser, the court held that a high school student's free speech and due process rights were not violated when school officials suspended him for two days for making a "sexually explicit" but not legally obscene speech at a school assembly. Id. at 685-686.

In addressing the question of whether the school newspaper could appropriately be characterized as a forum for public expression, the Kuhlmeier majority looked to a pair of 1980's cases. "[S]chool facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,'" Kuhlmeier, 484 U.S. at 267 (quoting Perry Educ. Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 47 (1983)), or by some segment of the public, such as student organizations. Id. (citing Perry, 460 U.S. at 46 n.7). Governmental bodies, such as school districts, do not "create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Id. (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)). Kuhlmeier stated that the First Amendment must be "applied in light of the special characteristics of the school environment," Tinker, 393 U.S. at 506, and that a school need not tolerate student speech that is inconsistent with its "basic educational mission," Fraser, 478 U.S. at 685, even though the government could not censor similar speech outside the school. 484 U.S. at 266. The court held that educators do not violate the First Amendment "by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." Id. at 273.

"The debate over the effect of the decision began immediately [after the ruling] in several periodicals," observed one researcher. Dickson, Attitudes of High School Principals about Press Freedom After Hazelwood, 66 Journalist Q. 169 (1989) (those publications included Editor & Publisher, Newsweek, Nation, and The Wall Street Journal). This researcher noted that while some scholars concluded the ruling would greatly decrease freedom of speech, others said that the decision was "sound constitutionally and restored the correct balance between the student press and the purpose of public education." Id.

In a survey of 100 high school principals in one state, over 60 percent of the respondents characterized their school publications as "open forums," but a majority said they would also consider suppression of certain types of subject matter in student publications. Id. at 171. Of the Missouri high school principals answered the survey, 89 percent indicated they might suppress "dirty language," while over 50 percent said they would consider suppression of material pertaining to sex or drugs. Id.

Over a third of the principals said material dealing with AIDS, student pregnancy, or problems related to divorce/one-parent homes might prompt suppression. Id.; cf. Click, Principals Favor Discipline More than a Free Press, 43 Journalism Educator 48-51 (1988) (summarizes a national survey of high school principals and newspaper advisors that reports that although most of those responding said they believed in a free press, they also believed discipline was more important than an uncensored press). The researcher observed:

> Principals in most cases do not seem to use censorship in conjunction with prior review, but they tend instead to react to problems brought to them by advisers. The survey found that even though most of them expect the adviser to notify them of anything that might be objectionable.... Principals seem to expect the adviser to handle potentially troublesome stories in most cases without getting them involved. Thus, advisers may be doing their own suppression -- either by censorship or by suggestion -- so that principals are not faced with such decisions.

Dickson, supra, at 173.

Since Kuhlmeier, at least one advisor has found himself in a courtroom after the distribution of a student's controversial newspaper article. The tenured faculty advisor for the Port Richmond [New York] High School newspaper, who was discharged from his position following the paper's publication of a student article opposing a federal holiday for Dr. Martin Luther King's birthday, brought an action under 42 U.S.C. sect. 1983 alleging the school board's and principal's actions violated the First and Fourteenth Amendments. Romano v. Harrington, 725 F. Supp. 687 (E.D.N.Y. 1989). On the defendant's motion for summary judgment "relying principally on [Kuhlmeier]," Id. at 688, the court held there was a genuine issue of material fact that precluded granting the motion. Id. at 691. The decision said:

> ... if the [Kuhlmeier] dictum espoused by defendants and the broad reading it invites were controlling, summary judgment would be improper because facts material to the First Amendment claim are is dispute. For example, the [Kuhlmeier] Court's discussion of school sponsorship reflected a concern with whether the students' expression 'might reasonably have been perceived to bear the imprimatur of the school.' [484 U.S. at 271.] In this case, the question of whether, at the time of the events in question, the contents of [the newspaper] might reasonably be perceived to bear Port Richmond High's imprimatur is a genuine trial-worthy issue. The ... masthead states that it does not express the views of the Board of Education, the school administration, or its faculty advisor. Affidavits submitted by the plaintiff and defendants indicate, however, that a genuine issue exists as to whether the policy expressed in the masthead was in effect at the time of the events in question.

Id. at 690-691. Since journalism was not incorporated into the formal curriculum, the court observed the "speech and expression rights of Port Richmond High's journalists are therefore less limitable, in the name of education, than those of their [Hazelwood East] counterparts." Id. at 690.

A California court reached a similar conclusion in Leeb v. DeLong, 198 Cal. App. 3d 47, 60, 243 Cal. Rptr. 494, 502 (1988). The court ruled that although a "school district may censor expression from an official school publication which it reasonably believes to contain an actionable defamation," under Cal. Educ. Code sect. 48907 (West 1990), it may not censor expression as a matter of taste or pedagogy because "grading or postpublication discipline, if warranted," are sufficient sanctions. Id.

Within a year of the Kuhlmeier holding, the Ninth Circuit Court of Appeals distinguished the dissemination of student-produced, non-school-sponsored publications from those created as part of the school curriculum. Parents and students brought suit in Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988), to challenge a school district policy requiring the submission and approval of any material to be distributed at a high school. A group of students had written and produced an unauthorized four-page newspaper that was distributed at a school-sponsored class barbecue. In addition, a parent placed copies of the newspaper in faculty and staff mailboxes. The school principal reprimanded the students for violating the district's review policy, though he did not find any particular passage or article in the newspaper objectionable. Id. at 1150. The Court of Appeals held:

> The student distribution of the non-school-sponsored material under the Supreme Court's decisions in Tinker and Kuhlmeier cannot be subjected to regulation on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials, and no more than undifferentiated fear appears as a basis for regulation in this case. There is therefore no justification for this policy, which conditions all distribution of student writings on school premises upon prior school approval. Inter-student communication does not interfere with what the school teaches....
>
> [The school's] policy conditions distribution of all written materials on school premises upon prior school review for censorship purposes, and is directed at communication lacking any element of school support or endorsement. It is a blanket policy of unlimited scope and duration.... We hold that [the] policy is overbroad and violates the appellants' first amendment rights.

Id. at 1159. As the policy in the case was without limitation, the court declared it did not need to decide under what more limited circumstances, if any, a school may impose a policy of predistribution review. Id. The holding was also limited to distribution policies that are content based, and did not pertain to regulations of time, place, and manner of distribution. Id.

Leaders in journalism education have offered advice to high school journalism educators and students on how best to approach the operation of publications under the Kuhlmeier holding. Schools have been urged to reevaluate or establish policies that clearly define the role of the newspaper as well as the role of the administrators, advisers, and students. See Miles, Freedom of Speech/Press and High School and College Newspapers, 16 Educ. Considerations 29-33 (1989); see, e.g. Eveslage, Adopting Publications Guidelines to Avoid Conflicts and Courtrooms, 22 Communications: Journalism Educ. Today 12-15 (1988). One suggestion that has been offered is requiring advisors to be well-trained. K. Phillips, Freedom of Expression for High School Journalists: A Case Study of Selected North Carolina Public Schools, Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (72nd, Washington, D.C., August 10-13, 1989) (available through ERIC database). Enrolling advisors and student staff members in scholastic press associations has also been recommended as another way to promote excellence in student publications while avoiding legal controversy. Sullivan, Scholastic Press

Associations: a Valuable Resource for Teachers and Students, 72 NASSP Bulletin 45-48, 50-51 (1988).

After observing that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges," 484 U.S. at 273, the court in Kuhlmeier said that it "need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." Id. n.7. One state court has also left the issue of the applicability of Kuhlmeier to college publications to be considered on another day. In Walko v. Kean College of N.J., 235 N.J. Super. 139, 561 A.2d 680, 687 n.5 (1988), after having determined there was no defamation in a libel suit, the court said, "there is no need in this case to consider the key question of the applicability of [Kuhlmeier] to a state college's newspaper."

Beyond the high school setting of Kuhlmeier, one commentator has said that in a college or university setting, the ability of college administrators to direct or curtail freedom of expression is severely limited. Brown, The College Press at Public Institutions, 48 West's Educ. L. Rep. 745 (1988). The writer observed:

> The trend of First Amendment college cases continues to protect the interests of the student press to publish free of government restraint.... The production of a college newspaper represents the collective viewpoints of its staff and not necessarily the opinions of the college or university. Thus, the campus press takes on many of the characteristics of a privately owned newspaper which expresses the

> viewpoints of the publisher and not necessarily the views of the city it serves. Moreover, college editors and staff often control editorial decisions and advertising policies.
>
> High school press differs fundamentally from the college press, mainly because the former is often curriculum related and is controlled by school officials who stand in _parens patraie_ of students. (_Parens patraie_ is the concept of standing utilized by the state to protect those quasi-sovereign interests, such as the health, comfort and welfare of the people. Black's Law Dictionary 1003 (5th ed. 1979).)
>
> ... although [_Kuhlmeier_] may be interpreted as widening the authority of secondary school officials, the decision cannot be viewed as widening the authority of college officials. Thus, [_Kuhlmeier_] cannot be viewed as having an appreciable effect on college and university expressive activity because of the unique nature and role that such institutions play in the educational process and because of the traditional right of the college press to exercise editorial autonomy.

_Id._ at 754. This commentator stated that college student press cases reflect two important principles: that college officials have little authority over the campus press and that student journalists enjoy editorial control over their publications. _Id._ at 752.

In the months after the _Kuhlmeier_ decision, other courts dealt with the framework the case created for determining when schools have created public forums.

In _Planned Parenthood v. Clark County School District_, 887 F.2d 935 (9th Cir. 1989), _reh'g granted_ 905 F.2d 1346 (9th Cir. 1990), a family planning group challenged the rejection of its advertisements for publication in high school newspapers, yearbooks, and athletic event programs. Planned Parenthood conceded that these publications were not traditional public forums, but argued that the school district had designated its publications as forums for public expression. Id. at 941. Noting that the "school district's policy and practice regarding its newspapers and yearbooks is strikingly similar to that of the Hazelwood School Board," Id. at 941-942, the court said the district had "reserved to itself the responsibility to regulate the conduct of the school newspaper [and yearbook] in accordance with its perception of the proper function of education." Id. at 942 (quoting Burch, 861 F.2d at 1158, in its discussion of the Kuhlmeier holding). Therefore, under the analysis of Kuhlmeier, which utilized the precedent of Perry and Cornelius, the court found nothing to indicate the school district intended to create any manner of public forum in its publications. Id.

In the matter of the athletic programs, the court said though they are not part of the school district's curriculum, they are "disseminated under its auspices." Id. at 943 (quoting Kuhlmeier, 484 U.S. at 272). Therefore, these programs play a role, however small, in the school's mission, and a school must be "entitled to 'disassociate itself' from the speech" inconsistent with that mission. Id. (quoting Kuhlmeier, 484 U.S. at 266, which quoted Fraser, 478 U.S. at 685). Declaring that there was no significance that the programs' purpose was extra-curricular, the court concluded the athletic event programs were nonpublic forums. Id. The court added:

> The common thread among all of these justifications is that the school district wished to steer clear of any distraction which could impede its educational mission.... [In Kuhlmeier] the court did not require the school to prove that subjects excluded from its school-sponsored publication were indeed

> sensitive to the audience. Rather, the court reasoned that the school "could reasonably have been concerned" about the effects of the restricted material. [Kuhlmeier, 484 U.S. at 274.] Here, the school district "could reasonably have been concerned" that the Planned Parenthood's advertisement would distract from its mission. No further proof is required.

Id. at 946.

The constitutionality of a school's policy concerning the distribution of non-school materials was the focus of Nelson v. Moline School Dist. No. 40, 725 F. Supp. 965 (C.D. Ill. 1989). In the case, a groups of student, acting without administrative approval, passed out copies of a non-denominational religious publication in the school hallways before classes began. Id. at 967. The students were told to stop distributing the publication as it was against school policy, and then several weeks later the school administration announced a new policy regarding the distribution of fliers, announcements, and papers. Id. at 967-968. The announced policy provided for the submission of materials to the administration and regulation as to the time and location of distribution. Id. at 968. In a challenge to both the old and new policies, the students argued that Tinker should be applied to all cases involving non-school speech and that the hallways of a public school were public forums. Id. at 973.

The court rejected both arguments, stating that there was no evidence the plaintiff's magazine had "been treated any differently than other non-school publications" and that the hallways had "never been held in trust for open communication among the general populace." Id. The court said:

> Even if this Court were to have found the hallways to be limited public forums, the existing regulation is an entirely reasonable restriction on the time, place and manner of communicating non-school speech.... The rule does not preclude non-school organizations from reaching the students; it merely limits the time during which and places at which the students can be reached.

Id. at 974. Arguments that the policy amounted to prior restraint were firmly rejected by the court. Id.

A California court considered a similar question in Perumal v. Saddlebrook Valley Unified School Dist., 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988), cert. denied, 488 U.S. 933 (1988). In Perumal, a group of high school students petitioned for a writ of mandate seeking an order to allow distribution of a religious club's fliers on high school grounds and to compel publication of the club's advertisement in the high school yearbook. 243 Cal. Rptr. at 546. The petition was denied as the school board's "closed forum" policy was found to be constitutionally permissible regulation which did not contravene the establishment clause. Id. at 551.

Beyond the use of the Kuhlmeier decision to delineate the extent of student press rights and to determine what types of forums school districts have created, the case has also been applied by courts to the issue of determining the scope of administrative control over school-sanctioned expressive activities.

Virgil v. School Board of Columbia County, Florida, 862 F.2d 1517 (11th Cir. 1989), presented the question of whether the First Amendment prevents a school board from removing a previously approved textbook from an elective high school class because of parental objections to the material's vulgarity and sexual explicitness. The textbook in question, which contained both required and optional readings, was the text for "Humanities to 1500" approved by the Florida Department of Education. Id. at 1519 n.2. The selections deemed objectionable were an English translation of "Lysistrata," by the Greek dramatist Aristophanes, and "The Miller's Tale," by the English poet Geoffrey Chaucer. Id. The court stated:

> [Kuhlmeier] established a relatively lenient test for the regulation of student expression which "may fairly be characterized as part of the school curriculum." Such regulation is permissible as long as it is "reasonably related to legitimate pedagogical concerns." [484 U.S. at 273.]
>
> In applying the test the Supreme Court identified one such legitimate concern which is relevant to this case: "a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics ... [e.g.] the particulars of teenage sexual activity." [Id. at 272.]

862 F.2d at 1521. While conceding that the objectionable works were "widely acclaimed masterpieces of Western literature," Id. at 1523, the court said it could not "conclude that the school board's actions were not reasonably related to its legitimate concerns regarding the appropriateness (for this high school audience) of the sexuality and vulgarity in these works." Id.

A school district's failure to renew a nontenured teacher's contract for showing an R-rated film in class was at issue in Krizek v. Cicero--Stickney Township High School Dist. 201, 713 F. Supp. 1131 (N.D. Ill. 1989). While acknowledging that "Kuhlmeier can be factually distinguished from the present case," the court said that it agreed with the application of the case in Virgil and found that "the Kuhlmeier standard, which blends well with the standard previously articulated in this circuit, applies to challenges against school administration rules regarding curriculum contents." Id. at 1139. After a discussion of other precedent, the court found the district's action was not violative of the teacher's First Amendment right if the nonrenewal decision was "reasonable" as determined by two factors: (1) whether the school could reasonably find that, given the school's right to establish contents of curriculum, showing the film offended legitimate pedagogical concerns and (2) the severity of the sanction. Id. at 1142-1143.

In Wexner v. Anderson Union High School Dist. Board of Trustees, 209 Cal. App. 3d 1438, 258 Cal. Rptr. 26, 41 (1989), (Puglia, P.J., dissenting), a judge noted in his dissent that Kuhlmeier and Fraser "teach that a book may constitutionally be removed from a school library even though it is not legally obscene."

Another case that was decided in light of Kuhlmeier involved students at a Virginia high school who brought a First Amendment challenge against their principal for banning the school's "Johnny Reb" symbol. Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988). The court held that the principal was justified in eliminating the symbol after receiving complaints from black students and parents. Id. at 803. The court said:

> [S]chool officials need not sponsor or promote all student speech. See [Kuhlmeier, 484 U.S. at 272; Fraser, 478 U.S. at 681]. This is particularly true for anything that the public "might reasonably perceive to bear the imprimatur of the school." [Kuhlmeier, 484 U.S. at 271]. There is a difference between tolerating student speech and affirmatively promoting it. Id.
>
> A school mascot, or symbol bears the stamp of approval of the school itself. Therefore, school authorities are free to disassociate the school from such a symbol because of educational concerns. Here, Principal Holsinger received complaints that Johnny Reb offended blacks and limited their participation in school activities, so he eliminated the symbol based on legitimate concerns. Except to make a rough threshold judgment that this decision has an educational component, we will not interfere....

Id. at 802.

In the over three years since the Supreme Court handed down Hazelwood School Dist. v. Kuhlmeier, lower courts in both the federal and state judiciary have carried this ruling on into areas beyond scholastic publications. Its analysis as to a school's creation of a "public forum" and as to the extent of administrative control a school can exercise over the expression of its students is profoundly shaping rulings in these areas.

Educational issues have come to the forefront in the debate over how this country should approach the future. In the Supreme Court, litigation involving the authority of schools as balanced against the rights of their students has consistently tilted toward the educators in the 1980s. Students' Fourth Amendment, as well as First Amendment, rights have been viewed as having less weight than society's interest in preserving an educational environment within the schoolhouse. See N.J. v. T.L.O., 469 U.S. 325 (1985). With its current membership, there would appear to be little justification for anticipating that this approach will change on the Supreme Court soon. Therefore, Kuhlmeier will continue to provide the framework used for the analysis of judicial questions of school power over student expression for years to come.

THE COURTS AND "TITICUT FOLLIES":

A CASE STUDY IN PRIVACY V. PUBLIC INTEREST

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INTRODUCTION

The New York and Massachusetts court cases over exhibition of Frederick Wiseman's controversial documentary film "Titicut Follies" provide a case study of the ongoing legal conflict between the individual's right to privacy and the public's right to know. The 1967 film, which depicts the sub-human conditions and poor treatment of mentally ill inmates at the Massachusetts Correctional Institute (MCI) at Bridgewater, also sparked debate from an ethical standpoint. The case raises questions regarding the notion of informed consent and the idea of a viewing elite, as well as questioning state motives for suppressing the film. This paper summarizes the complex legal and ethical issues raised in the "Titicut Follies" cases.

THE FUNDAMENTAL LEGAL CONFLICT

Privacy and public interest are competing rights. The right to privacy was first articulated by attorneys Warren and Brandeis in their 1890 *Harvard Law Review* article "The Right to Privacy." Although there is no explicit expression of this right in the Constitution, Warren and Brandeis inferred it from the Third, Fourth, Fifth and Ninth Amendments. Brandeis elaborated the right in his dissent to Olmstead v. United States :

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness....They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by man (277 US 438, 478, 1928).

Here, the right to privacy is defined as the right to be let alone. However, Warren and Brandeis had said in the *Harvard Law Review* article that the right to privacy should "not prohibit any publication of matter which is of public or general interest."[1] Clearly, from the moment the right to privacy was first articulated, the conflict with matters in the public interest was apparent.

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[1] "Comment: The Titicut Follies Case: Limiting the Public Interest Privilege," *Columbia Law Review* 70, 1970, 359.

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Private facts were later defined in the Restatement (Second) of Torts as "phases of [an individual's] life and...activities...which he does not expose to the public eye, but keeps entirely to himself.... Sexual relationships, for example, are normally entirely private matters, as are...many unpleasant or disgraceful or humiliating illnesses...."[2] Mental illness may be among these "unpleasant" illnesses and consequently protected by the right to privacy, but when the mentally ill are confined in a public institution such as MCI Bridgewater, the way they are cared for may be considered a matter of public interest. Filmmaker Wiseman certainly thought so.

In the "Titicut Follies" cases, the courts had the opportunity to grapple with the competing rights of privacy for the individual and the public's right to know. The conflict was so great that "Titicut Follies" is the only American film to have restrictions placed on its exhibition for reasons other than obscenity and national security.[3]

GAINING ACCESS AND MAKING THE FILM

Filmmaker and lawyer Frederick Wiseman first approached Superintendent Charles Gaughan of the Massachusetts Correctional Institution (MCI) at Bridgewater in 1965; he wanted permission to make a documentary film inside the institution. Bridgewater is a state prison for the criminally insane, defective delinquents, alcoholics and drug addicts, sexual deviants and juvenile offenders. Wiseman was interested in conditions at Bridgewater and wanted to make his first feature-length documentary film there. Gaughan supported Wiseman's request, with hopes that the film would help in his own cause to bring about reform in the institution.

It took a year to get permission to make the film. Gaughan's supervisor, State Commissioner of Corrections John Gavin, initially denied the request, then granted it after Wiseman had drawn the support of state legislator Katherine Kane and Lieutenant

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[2] Restatement (Second) of Torts, quoted in "Comment...", 363.

[3] Donald F. McWilliams, "Frederick Wiseman'" *Film Quarterly* 24, Fall 1970, 20.

Governor Elliot Richardson. State Attorney General Edward Brooke sent Gavin an advisory opinion saying that Gaughan had the right to consent to the filming provided that the filmmaker followed "the usual precautions," which were left unspecified. Much of the communication in the consent process was undocumented.[4]

Wiseman's 1965 proposal for the film described the project as being about three people: an adult inmate, a youthful offender, and a corrections officer. Wiseman's proposal states his plans to use interviews and professional actors. Regarding consent procedures, Wiseman wrote:

> No people will be photographed who do not have competency to give a release. The question of competency would in all cases be determined by the superintendent and his staff and we would completely defer to their judgement.[5]

After the proposal was accepted, Wiseman and his cameraman spent 29 days between April 22 and June 29, 1966, shooting 80,000 feet of film in the prison. They were accompanied at all times by prison staff. It took Wiseman over a year to edit the film down to 87 minutes. Over the summer of 1967, Wiseman arranged to enter the film in both international and domestic film festivals. Gaughan and Richardson saw "Titicut Follies" in June of that year, but did not raise formal objections until September. On the eve of a showing of the film at the New York Film Festival, Gavin and Richardson, who had been appointed attorney general, told Wiseman he could not show the film to anyone, indicating that it was their understanding that they had final censorship rights.[6] The next day, a Suffolk Superior Court Justice granted a temporary restraining order for showings in Massachusetts. Within the week, counsel for the Attorney General's office had filed papers in the New York Supreme Court seeking temporary and permanent injunction of showing "Titicut Follies" in that state.[7]

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[4] For a detailed account of the consent procedure, see Carolyn Anderson and Thomas Benson, "Direct Cinema and the Myth of Informed Consent: The Case of Titicut Follies," Image Ethics (New York: Oxford University Press 1988), 63-70.

[5] Anderson and Benson, 63-64.

[6] Ibid., 78.

The court battles had begun.

THE COURT CASES

Social scientists Carolyn Anderson and Thomas Benson have pointed out that in the different state and federal courts in which the "Titicut Follies" cases have been heard, all three possible decisions have been reached: complete prohibition, limited exhibition, and unrestricted exhibition.[8] An examination of the various court decisions illustrates the courts' difficulty in handling the privacy/public-interest debate.

New York

The day after papers were filed in New York, Justice Francis Murphy viewed the film and denied the request to enjoin its showing in that state. Justice Murphy said that the documentary had social significance and was therefore protected. Furthermore, he said that the state's right to approve the film had not been proven to exist.[9] The Commonwealth of Massachusetts promptly filed a second motion, naming two inmates as coplaintiffs, in an effort to enjoin commercial showing of the film in a New York movie theater. Justice Saul Streit denied the injunction, saying that "insufficient evidence had been entered by the Commonwealth to exercise the drastic power of the restraining order."[10] The Commonwealth was effectively blocked from enjoining showing of the film in New York state.

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[7] Thomas Benson and Carolyn Anderson, Reality Fictions: the Films of Frederick Wiseman (Carbondale: Southern Illinois University Press, 1989), 49-52.

[8] Anderson and Benson, 78.

[9] "Mass. Detests Film's Invading Privacy of Hellhole," Variety, October 4 1967, 11.

[10] Benson and Anderson, 50.

Suit was filed a third time in New York, this time in federal court. In November 1967 four MCI Bridgewater guards filed for defamation and invasion of privacy. In Cullen v. Grove Press (276 F. Supp. 727 (NY 1967)), the plaintiffs wanted to prevent current and future exhibition and distribution of the film, citing a New York privacy statute that allowed filing "if a person, firm, or corporation...uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such a person."[11] The guards said they had not signed releases. Federal District Judge Walter Mansfield ruled that free expression by way of motion pictures is guaranteed under the First and Fourteenth Amendments, citing Burstyn v. Wilson:

> Motion pictures are a significant medium for the communication of ideas.... [They] may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes artistic expression.[12]

Recalling Time, Inc. v. Hill, Mansfield said that "the plaintiff's motion must be denied unless 'Titicut Follies' is a false report of conditions at Bridgewater, made with knowledge of its falsity or in reckless disregard of the truth" (276 F. Supp. at 729). The judge expressed confidence that the film was not a false report and therefore could not support the claim of defamation. Mansfield also said that the film was in the public interest:

> The conditions in public institutions...are matters which are of great interest to the public generally. Such public interest is both legitimate and healthy. Quite aside from the fact that substantial sums of taxpayers' money are spent annually on such institutions, there is the necessity for keeping the public informed as a means of developing responsible suggestions of improvement and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestions or protests (276 F. Supp. at 728-9).

In response to the guards' claim of invasion of privacy and the issue of releases, he said that the filming occurred from a close physical distance and therefore consent could be assumed on the part of the guards (276 F. Supp. at 730). Injunction was denied, but the judge was careful to state that the court's conclusions should have no bearing on privacy rights claims brought by individual inmates or state claims for breach of contract (276 F. Supp. at 731).

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[11] Ibid., 70.

[12] Edward de Grazia and Roger K. Newman, Banned Films: Movies, Censors and the First Amendment (New York: KK Boulter Company, 1982), 81.

Massachusetts

Political context

The Massachusetts court system made different decisions regarding "Titicut Follies." Although some of these decisions may have truly stemmed from thoughtful application of the law, it is important to examine the political context in which the decisions were made. First of all, a number of scandals had occurred at Bridgewater in 1966 and early 1967. A Massachusetts Bar and Mass Medical Society investigative committee found that hundreds of inmates had been kept at Bridgewater illegally for varying lengths of time, some for many years.[13] In addition, the state diverted funds from Bridgewater to other mental institutions, an inmate committed suicide by eating rat poison, and Albert DeSalvo (the Boston strangler) escaped.[14]

The state was rife with political turmoil at the time, as well. There was a struggle going on between the Department of Corrections and the Department of Mental Health for control over the facility at Bridgewater.[15] Tensions were also running high with Republicans winning the top elected posts of governor, attorney general, senator and lieutenant governor, while the legislature stayed in the hands of the Democrats. When "Titicut Follies" hit the courts, the Democrats seized upon it as an example of Republican moral insensitivity. "This intensely partisan and extremely hostile environment was the context of the 'Titicut Follies' hearings."[16] Exacerbating the situation was a press that tended to sensationalize the proceedings and simplify the issues, without having ever viewed the film.[17]

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[13] Charles Taylor, "Titicut Follies", *Sight and Sound* 57, Spring 1988, 98.
[14] Benson and Anderson, 25.
[15] Ibid., 57.
[16] Ibid., 59.

Trial court

From mid-October to mid-December 1967, Suffolk Superior Court Justice Harry Kalus heard the "Titicut Follies" case. The state filed suit against Wiseman and the Bridgewater Film Company for breach of oral contract and invasion of privacy of named inmates. The Commonwealth asked that all money from showings of the film be held in trust for the inmates and sought a permanent injunction on the exhibition of the film in Massachusetts. The prosecution focussed on promises unkept, including Wiseman's promise in the 1965 written proposal to get releases from those filmed and to film only competent inmates. Richardson and Gavin also said that Wiseman had promised them the right of final approval before the film was shown.[18] With no written record of this promise, it was Wiseman's word against the state's.

The defense contended that there were no conditions actually agreed upon that were breached. Even if there had been a prior censorship agreement, they said it would be unconstitutional and legally unenforceable. Regarding the consent issue, Wiseman focused on consent procedures, in which competence was assumed by the film crew unless the prison staff said otherwise, which it never did. The problem with determining competency was that everybody assumed that somebody else was responsible for determining it. Furthermore, Wiseman said that all people who were pictured gave their consent, although it was in many cases unwritten.[19]

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[17] Ibid., 63.
[18] Ibid., 76.
[19] Ibid.,76-78.

Consent issues

The central issue in the above discussion, it seems, is the notion of consent. The state had to grant consent for the film to be made, and the subjects of the film (inmates) or their guardians had to grant consent for their likenesses to appear in the film. The notion of informed consent is the ethical touchstone of any kind of field research, be it in the social sciences or in the realm of documentary film and photography.[20] Federal regulations for field work define informed consent as "consent which is knowledgeable, exercised in a situation of voluntary choice, made by individuals who are competent or able to choose freely."[21] In the case of mental patients, the researcher must get consent from the guardian and the actual patient.

The government definition seems clear cut. When a researcher or filmmaker is actually working, however, the task of informed consent is not so simple. Regardless of the filmmaker's intentions to get informed, written consent from every individual, the process of documentary filmmaking, like the process of inductive field research, is fluid and works against the efficient and timely procurement of releases.[22] In addition, there is the problem of informing people as to what they are participating in. "Fieldworkers usually enter the field with an open-ended sense of purpose; they tend to work inductively and may shift interests and outlooks as the research proceeds; practical exigencies may force extensive change of plans."[23] Consequently, the flexibility necessary for effective field research, and documentary filmmaking, poses problems for implementing a strict notion of informed consent, especially at the beginning of a project. It is almost impossible to know at the outset where the filming will lead. Add to that the fact that the filmmaker must go through an editing process and that the audience will have an unpredictable reaction, and the idea of informed consent becomes increasingly problematic.

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[20] Howard Becker, in Image Ethics , xii.

[21] Barrie Thorne, "You Still Takin' Notes? Fieldwork and Problems of Informed Consent," *Social Problems* 27, February 1980, 285.

[22] Benson and Anderson, 23.

[23] Thorne, 287.

Sociologist Barrie Thorne points out that when a researcher wants to enter an institution, consent must first be obtained from the people with power before the actual subjects can even be approached. In addition, "informed consent applies to individuals, each of whom is to be treated the same, and ignores the social structure and deep-seated differences of power."[24] The doctrine of informed consent on the face of it protects individuals, but it also protects groups with power from being held responsible for their role in the organization. Finally, Thorne asserts that the ideal of informed consent focuses on an individual's right to say no, while leaving open to question the individual's right to say yes.

> What if a group of prisoners or mental patients want their situation studied and made public, but the wardens or the hospital administrators, fearful of exposure, refuse the researcher's request for access to the institution? If it made unjust conditions known so they might be remedied, such a study could be justified on ethical grounds, but if researchers had to disguise their purpose to conduct the study, they would violate the ethical principle of informed consent.[25]

In a case where the filmmaker wants to make a film for the purpose of inspiring social reform, the content may be controversial. A full explanation of intent to those in power could cause them to withhold consent. Thus, the ideal notion of informed consent is based on abstract individualistic assumptions that do not mesh with complexities in the real world.

Trial Judge Harry Kalus did not take into account these complexities. He ruled that releases that had been obtained from inmates were null and void and that it was the state's duty to protect the inmates from exploitation (356 Mass. at 255). In contrast to the New York courts, Judge Kalus said that "the question of whether the film has any value as a social document is irrelevant to the issues on the case."[26] Despite this, the defense called witnesses who attested to the social value of the film, including a sociology professor at Harvard Law School, a *Life* magazine film critic, a retired director of Harvard's Nieman Fellowships, the Dean of Boston University School of Public Communication, a Yale University law professor, and an associate professor of psychology at Tufts Medical School.[27]

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[24] Ibid., 293.
[25] Ibid., 293.

Invasion of privacy

The state based its invasion of privacy claim on the fact that the film depicted a number of inmates in full frontal nudity, an inmate provoked into a tirade by taunting guards, a doctor force-feeding an inmate through a tube, and an inmate revealing information about molesting his own child.[28] The defense countered that "there were no invasions of privacy substantially greater than those inevitably arising from the very fact of confinement."[29] A *Columbia Law Review* case comment addressed the notion of prisoner's privacy:

> To the extent that efficient administration of the hospital demands conformity, the prisoner is necessarily deprived of his privacy. Medical and security examinations, for example, result in constant intrusions. Some Courts hold that one loses all privacy rights in jail and the Supreme Court has held that one's privacy interests are severely reduced during incarceration.[30]

Attorney General Elliot Richardson, in a letter to the *New Republic*, spoke of a need for "a decent regard for the dignity and privacy of those who happen to be patients at Bridgewater State Hospital...."[31] Wiseman responded in an interview in the *Civil Liberties Review* that "the question that Mr. Richardson never faces is whether the inmates had any privacy in an institution that kept men naked in isolation cells as a form of punishment, offered no competent medical or physical treatment, and tolerated physical abuse of the inmates by the guards."[32] The question is, how much privacy is an insane convict entitled to in the face of the public's right to be informed about a state scandal?

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[26] Judge Harry Kalus, quoted in Benson and Anderson, 81.
[27] "Case Comments," *Suffolk Law Review*, 4, no.1, 1969, 198 , n.
[28] Benson and Anderson, 34.
[29] Carolyn Anderson, "The Conundrum of Competing Rights in 'Titicut Follies'", *Journal of the University Film Association* 33(1), winter 1981, 19.
[30] "Comment...", 364.
[31] cited in Thomas Atkins, Frederick Wiseman (New York: Monarch Press, 1976), 63.

At the trial level, the right of privacy won out over the public's right to know. Judge Kalus ruled that the film is an intrusion into the right of privacy of each inmate and that the public interest does not warrant the unauthorized use of pictures of identifiable people in humiliating circumstances (356 Mass. at 255). "No amount of rhetoric, no shibboleths of 'free speech' and the 'right of the public to know' can obscure or masquerade this pictorial performance for what it really is - a piece of abject commercialism, trafficking on the loneliness, on the human misery, degradation and sordidness in the lives of these unfortunate humans."[33]

The invasion of privacy issue was clouded by the issue of nudity in "Titicut Follies." Some viewers could not get beyond the nudity and obscene language to the content of the film. Judge Kalus wrote, "There is a new theme -- crudities, nudities and obscenities.... It is...a contrived scenario -- designed by its title and by its contents to titillate the general public and lure them to the box office...."[34] Actually, the film draws its name from the entertainment show put on by the inmates and the guards once a year at Bridgewater. Furthermore, the suggestion that people would view the film out of curiosity or some desire for titillation implies that the general public finds naked, insane people erotic.

It is interesting to compare Judge Kalus' ruling on nudity in the film with that of New York District Judge Mansfield, who said, "the nudity appears in each instance to form an integral part of an episode that is of legitimate public interest...there are no commentaries or actions that could be construed as an appeal to any prurient interest in sex, and this court does not believe that the material is so patently offensive as to affront community standards" (276 F. Supp. 730-1). Judge Mansfield may have been drawing on the Restatement (Second) of Torts to determine what was proper:

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[32] Ibid., 72.
[33] Kalus, quoted in Benson and Anderson, 82.
[34] Ibid., 82.

> In the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.[35]

About the Massachusetts trial court decision, Wiseman said, "It was all in the hands of this judge, and it was clear that he hated me and hated the movie, from the first day. The moment the thing got started, I knew I was cooked." [36] Wiseman was, indeed, cooked. Judge Kalus found for the plaintiff on both the claim of breach of contract and that of invasion of privacy, and ruled for a permanent ban on the exhibition of the film and the destruction of all film footage. He was the first Commonwealth judge to base a decision on a right to privacy.[37]

The style of the film

In his decision, quoted in Benson and Anderson, Judge Kalus reacted strongly to the organization of the film: "The film is 80 minutes of brutal sordidness and human degradation. It is a hodge-podge of sequences, with the camera jumping, helter-skelter, from the showing of an inmate in an act of masturbation to scenes depicting mentally ill patients engaged in repetitive, incoherent and obscene rantings and ravings."[38]

Judge Kalus' reaction raises the issue of the style of filming, editing and presentation used by Wiseman in creating "Titicut Follies." The final film differed from that described in Wiseman's initial proposal in at least one respect: he did not incorporate interviews or professional actors. His film is strikingly unlike other documentaries of the period in that there is no authoritative narrator guiding the viewer through the piece, no music, and no story line with a beginning, middle and end. He made the film this way to reduce the distance between the audience and the subject of the film: "The way I try to make a documentary is that there's no separation between the audience watching the film and the events in the film.... Narration...immediately separates you from the experience of what you're going to see and hear, by telling you that it has nothing to do with you, or by telling you what to think about."[39] The viewers have to decide for themselves how to relate to and perceive the events on the screen.

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[35] "Comment...", 370.

[36] Wiseman, quoted in Taylor, 101.

[37] Anderson and Benson, 78.

[38] Benson and Anderson, 82.

Wiseman wants the viewer to experience what it is like to be an inmate at Bridgewater. When Wiseman made the film, he believed that the documentary would increase people's awareness and thereby bring about social change.[40] By filming and editing the film the way that he did, his aim was to reach and affect the viewer more directly than he felt was possible through a more traditional documentary approach.

Court of appeals

The defense appealed the decision, and the Massachusetts Supreme Judicial Court heard the case in May 1969. Focusing first on the issue of breach of contract, the court said that Wiseman had violated the first two conditions of consent, that only those competent to sign releases and only those consenting in writing be shown. The court avoided the issue of the state's asserting censorial powers by calling it "superfluous" in light of the Wiseman's clear breach of contract in the first two provisos (Commonwealth v. Wiseman 356 Mass. 251 (1969)). The court also said that the state, in its role as *parens patriae*, has the power and the duty to require the two consent procedures in protecting inmates at Bridgewater from invasions of privacy; "general provisions [for incompetent people] import all reasonable power [to the state], and the duty to exercise proper controls over the persons confined and the conditions of their custody and to afford the inmates protection and kindness consistent with the terms and rehabilitative purposes of their commitments" (356 Mass. at 259). Why the state has failed in its duty to "afford inmates protection and kindness" in the manner in which it cares for the inmates is not discussed. First Amendment considerations are avoided by the focus on the breach of contract claim.

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[39] Wiseman, quoted in Atkins, 44-5.
[40] Anderson and Benson, 62.

Nor does the court see a problem with the state representing the inmates in a state court for the purpose of barring exhibition of a film that is by implication critical of the state; a *Columbia Law Review* case comment says, "the Commonwealth is concededly responsible for the inadequacy of Bridgewater, but was allowed to assert the interests of the inmates victimized by its failure, in order to suppress a film which would disclose the situation to the world. No inmate or relative testified against exhibition of the film at trial."[41] The interests of the state and of the inmates may not have been one and the same.

Commissioner Gavin is quoted as fearing that the public release of the film would cause the Commonwealth to become a national "laughing stock."[42] During the trial, not one single inmate or relative came forward to testify for either the prosecution or the defense. Wiseman has said he received phone calls and letters during the trial from relatives of inmates telling him they thought he had done the right thing. He suggested that relatives stayed away for fear the inmate would get punished if the relatives appeared in court.[43] It is notable that privacy violation complaints came only from state appointed guardians and never from the inmates or their relatives themselves.[44]

A topic addressed in the court's weighing of private and public interests was the clear identification of certain inmates in the film. The court said that the film could adequately portray conditions in the institution without showing identifiable inmates.

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[41] "Comment...", 361-2, n. 8.
[42] Benson and Anderson, 56-7.
[43] Wiseman, quoted in Taylor, 101.
[44] Anderson and Benson, 84.

Individual inmates do not have news value, said the court, so "recognizable pictures of individuals, although perhaps resulting in more effective photography, were not essential." (356 Mass. at 261). The *Columbia Law Review* comment on the case expressed a different view:

> The depiction of the genitals of an identifiable person is a perfect example of a case where such a portrayal adds to a film's effectiveness. The impact will be substantially greater if the public is forcefully reminded, as only the anguish expressed on a face can do, of the essential humanity of the inmates, that they are men and not animals. Faced with the inmates' nakedness, there may be shocked recognition of the full extent of their degradation and despair. A blacked-out face, or a figure filmed from behind, allows the viewer a sense of detachment, of unreality, which lessens his outrage.[45]

Wiseman would certainly agree.

A viewing elite

Although the appellate court supported the trial court's opinion that Wiseman breached the contract and that the film was an invasion of privacy, it differed on one important point. It recognized that the film has some value as a social document when it said "the film may indirectly have been of benefit to some inmates by leading to improvement of Bridgewater" (356 Mass. at 264). The court modified Kalus's decree, prohibiting showing to the general public but allowing exhibition to specialized audiences, including "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity" (356 Mass. at 262).

Essentially, the court has determined an elite that can legally see the film. There are a few problems with the court's decision. First, it implies that members of this elite will view the film with seriousness and try to be helpful, but that the general public would view it merely to satisfy curiosity (356 Mass. at 262-3). The court's apparently low opinion of the general public contrasts sharply with the attitude of the New York court in Cullen v.

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[45] "Comment...", 370-1.

Grove Press, Inc.: "The conditions in public institutions...are matters which are of great interest to the public generally. Such public interest is both legitimate and healthy.... There is a necessity for keeping the public informed as a means of developing responsible suggestions for improvement...." (276 F. Supp. at 728-9).

A second problem with the court's view is that in limiting the viewing audience of the film it says, "the Commissioner and Superintendent, under reasonable standards of custodial conduct, could hardly permit merely curious members of the public access to Bridgewater to view directly many activities of the type shown in the film" (356 Mass. at 259). On the contrary, it appears that the custodians of Bridgewater made a practice of allowing the general public into the institution:

> Throughout [Richardson's] term as lieutenant governor there were 8,000 to 10,000 visitors a year at Bridgewater. These visitors saw the same things that viewers of the film saw. I have, in the out-takes of the film, a tour of a group of students being taken through Bridgewater by their high school coach to expose them to the folly of a life of crime. Also in the outs is a picnic on the Bridgewater grounds for a group of students form St. Coletta's School for Exceptional Children.[46]

Wiseman tried to get the out-takes introduced as evidence at the trial, but Judge Kalus said they were irrelevant.[47]

Other problems with the decision include the fact that specialists tend to be overexposed and less affected by a film like "Titicut Follies" than members of the general public might be, that small groups of specialists have limited potential to exert political pressure to force reforms at an institution like Bridgewater, and that members of the intellectual and professional elite may be too closely connected to those in power to risk making waves.[48]

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[46] Wiseman, quoted in Atkins, 70.
[47] Taylor, 101.
[48] "Comment...", 368-9.

The court further diluted its modification of the lower court's ruling by insisting that an announcement be made at each showing to the effect that improvements had been made at Bridgewater since the film was made in 1966.

Continuing conflict between competing rights

Political and historical context aside, the primary legal conflict in the "Titicut Follies" case is that between the individual's right to privacy and the public's right to know what is going on in state institutions. It seems that the appellate court failed to directly address this issue, focusing on the more easily resolved breach of contract claim instead.

A number of commentaries on the case are critical of the court's decision to restrict viewing of the film. A *Cornell Law Review* case comment said, "Ironically, this first judicial recognition of a right to privacy in Massachusetts is designed to protect the sensibilities of the criminally insane from the effects of a disclosure which can only improve the squalid circumstances of their lives."[49] It goes on to point out that freedom of expression would not survive without a public interest privilege; consequently, individual interests must from time to time be subordinated.[50] The comment said:

> disclosure of information which shocks reasonable people is at times important speech.... The evidence cited by the court demonstrates that many viewers deemed the conditions in the institution, and not the film, to be unconscionable? ... If this had been a tort action on behalf of the inmates, should a court have found the film unconscionable: Or was its communicative force on an issue of public interest so overwhelming that even the most degrading depictions of others' lives could not overcome the constitutional privilege?[51]

Its question was partially answered in a little-publicized case brought by appointed guardians of 35 Bridgewater inmates, decided in Suffolk Superior Court in 1972 (citation unavailable). At the time of the trial in 1967, the state expected many inmates and/or their relatives to take action; actually, only this one 1972 case has ever gone to trial.[52] The action was taken on behalf of the inmates through guardians, of which Commissioner Gaughan was one. The claims were invasion of privacy and breach of contract. In a 72-page decision, Judge Robert Sullivan rejected all 560 claims made on behalf of the inmates and ruled for Wiseman on First Amendment grounds. Judge Sullivan said, "conditions at Bridgewater were all matters of news and of great public concern."[53] Three years after the appellate court decision in Commonwealth v. Wiseman, the public's right to know wins out and nobody pays any attention to it.

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[49] "Comment...",, 359.
[50] Ibid., 365.
[51] "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort," *Cornell Law Review* 68, March 1983, 359-60.

The plaintiffs claimed on behalf of the inmates that the film's public exhibition had caused psychological harm to the inmates, but the judge responded, "This court has been asked to place a dollar value on an almost imperceptible change in degree of sanity. Such a task is impossible."[54] As Benson and Anderson point out, Sullivan's decision raises two fundamental questions. First, can persons judged legally insane have their privacy invaded under any circumstances? Second, would a person treated and released from Bridgewater suffer mental anguish if his past in the institution was made public through exhibition of the film?[55]

In 1982, a former inmate at Bridgewater led a discussion group after a showing of the film at the University of Massachusetts-Amherst. Although he was not at the institution when the film was made, he advocated showing the film to the general public and felt confident that inmates in the film, some of whom he knew personally, would support its public showing as well.[56]

Wiseman has appealed the case to the U.S. Supreme Court two times, and both times the court has denied certiorari. His appeals are based on three points: that the restricting of showings to professional audiences constitutes censorship, that the Massachusetts court decision conflicts with the actual malice standard established in Time, Inc. v Hill, and that the decision allows a state to ban public showing of a documentary film depicting conditions in a state institution on the theory of enforcing restrictions imposed upon the filmmaker by the state as a condition of filming.[57] Both times, the vote has fallen one short of granting review.

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[52] Benson and Anderson, 72.
[53] Ibid., 73.
[54] Ibid., 73.
[55] Ibid., 73.
[56] Ibid., 93-4.

Justice Harlan, joined by Justices Douglas and Brennan, wrote a dissent. In it, he noted that balancing the individual's right to privacy and the public's right to know is problematic. He cited Cullen v Grove, Inc. regarding the importance of the public being informed about conditions in public institutions (398 U.S. at 961). Harlan also raised the issue that the breach of contract claim needs to be examined in light of a discussion of "how far a government may go in cutting off access of the media to institutions when such access will not hinder them performing their functions" (398 U.S. at 963). He believes that the state may have been more concerned with protecting itself rather than allowing the general public to see the film. Wiseman's lawyer is currently preparing another U.S. Supreme Court appeal.[58]

"TITICUT FOLLIES" TODAY

There are mixed reviews as to the actual impact that the film has made. Testimony at the trial in the Commonwealth indicated that after the film was completed, the state added 38 officers, 55 rehabilitation staff members, and 3 doctors to the staff at Bridgewater (356 Mass. at 260, n.8). Psychiatrist and former treatment director at Bridgewater James F. Gilligan thinks the film positively affected the "moral climate."[59] On the other hand, Benson notes that Charles Gaughan, who brought suit against the film, said the movie caused a setback in plans for a new facility.[60] And Wiseman, who started out thinking that documentary film could inspire social change, has changed his tune over the years:

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[57] "Case Comments," Suffolk Law Review, 4, no. 1, 1969, 206.

[58] "Film Banned in 1967 May Be Shown," *News Media Update*, National Newspaper Association, October 28 1989, 8.

[59] Benson and Anderson, 105.

> I no longer have the view that I had in the beginning that there might be a direct relationship between what I was able to show in these films and the achievement of social change. Nor have I observed any particularly successful strategies of change, as they are called.... I guess I've gone very far away from the liberal cliches and bromides that I started with, especially the simpleminded social-work view of help and intervention.[61]

A lot of people have seen the film in the past 21 years. In fact, the ban may have functioned more as a promotional device than a deterrent. Benson and Anderson have said:

> In a state bulging with law schools, medical schools, colleges, and universities, it seems that in the 1980s most individuals looking for an opportunity to see "Titicut Follies" in Massachusetts could probably find one more easily than an opportunity to see other documentaries made in 1967, or 1977, for that matter.[62]

If people are seeing the film and nobody is complaining about being denied access, why is Wiseman still fighting to lift the partial ban? Is it just a matter of principle?

According to *News Media Update*, eight inmates have died at Bridgewater since 1986.[63] In addition, Massachusetts is one of the only states that still houses civilly committed mentally ill patients with the criminally insane.[64] Finally, just because people are not complaining about not having access to the film does not mean they should not have the option of seeing it.

The film had a deep effect on one viewer, Dr. Leon Shapiro, former chief of the Division of Legal Medicine of Massachusetts. Dr. Shapiro used to commute to Bridgewater to help set up new services. The film, apparently, would not allow him to put the reality of Bridgewater out of his mind:

> There are some things we prefer not to know about -- I am afraid not too unlike the Germans who lived near Dachau. Seeing [the] film should be a mandatory

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[60] Ibid., 103.
[61] Wiseman, quoted in Atkins, 56.
[62] Benson and Anderson, 99.
[63] "Film Banned...", 8.
[64] Taylor, 98.

> (and repetitive) part of the training of every physician and lawyer and would be a remarkable antidote to public complacency about our "collective crime." I am sure you will get lots of static about "privacy", etc., but the real resistance (like mine) will be the wish not to know.[65]

In 1987, Wiseman filed a motion in Massachusetts to permit general showing. He said that the applicable law had changed, and the facts had changed. The court said the film could be shown to the general public if the inmates in the film could be tracked down and their consent obtained. To this end, it appointed Mitchell J. Sikora Jr. as guardian *ad litem*.[66] After an 18-month search, Sikora prepared his report. He found 10 incompetent people, five of whom said they had no problem with the film being shown. Of the seven competent people he found, three objected to the film being shown and four approved of the showing.[67] In September 1989, Suffolk Superior Court Judge Andrew G. Meyer came up with a compromise solution: if Wiseman blurs the faces of inmates who do not grant their consent, those who are incompetent, and those who could not be found, the film may be released to the general public. The Attorney General's office now advocates lifting the ban, because "Bridgewater is still a matter of public concern."[68] Does the change in official state stance on the case mean that privacy concerns diminish as time passes? In any event, Wiseman will not back down; blurring faces dilutes the impact of the film and impinges on his First Amendment rights as a filmmaker. Privacy and the First Amendment are still on conflict in the case of "Titicut Follies."

CONCLUSION

The courts never did resolve privacy issues in the "Titicut Follies" case. Different courts reached different conclusions. The Massachusetts courts ruled for privacy whereas the New York courts ruled in favor of the First Amendment. Over all, the courts balked at resolving the conflict between the individual's right to privacy and the public's right to know what goes on in state institutions.

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[65] Dr. Leon Shapiro, quoted in Atkins, 72.
[66] Benson and Anderson, 89.
[67] "Judge Proposes Compromise on Banned Film," *New York Times*, September 3 1989, 24.
[68] Ibid., 24.

Titicut Follies presents a complex case. Intertwined with the fundamental legal conflict between an individual's right to privacy and the public's right to know is the problematic notion of informed consent, the state's cloudy motives in bringing the suit and the disturbing idea of a viewing elite. Given the fact that the lower courts have reached conflicting conclusions, it will be interesting to see if the current U.S. Supreme Court chooses to hear the case on subsequent appeal.

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Federalism and Press Freedom:
Immuno A. G. in Historical Perspective

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Federalism and Press Freedom: *Immuno A. G.* in Historical Perspective

Abstract

The New York Court of Appeals' decision in *Immuno A.G. v. Moor-Jankowski* (January, 1991), is one of the most vivid examples to date of a state court employing the revitalized federalism or states' rights approach in an effort to create a local climate of press freedom extending well above the minimum levels required under federal law. The majority opinion cited the state's "exceptional history and rich tradition" in safeguarding liberty of the press and indicated that a media defendant's motion for summary judgment in a libel action was properly granted on independent state constitutional grounds. Moreover, the court tried to insulate this decision from federal judicial review.

This study uses the decisions and opinions in *Immuno* for reference and illustration in order to place the current trend of state constitutionalism, and in particular its relationship to the status of press freedom, in historical perspective. The analysis considers the roots and evolution of federalism, the sometimes adversarial relationship between the states and the federal government in matters of individual rights, and the development of the doctrine of independent and adequate state grounds. In addition, this study highlights selected aspects of New York's state history to better contextualize the New York Court of Appeals' ruling.

Federalism and Press Freedom:
Immuno A. G. in Historical Perspective

In January, 1991, the Court of Appeals of New York cited the state's "exceptional history and rich tradition" of safeguarding liberty of the press and concluded that a media defendant's motion for summary judgment in a libel case was properly granted on independent state constitutional grounds.[1] This ruling in *Immuno A.G. v. Moor-Jankowski* was necessary only because the state court's judgment in the same case a year earlier, which was grounded in the core freedom of expression values protected by both the state and federal constitutions,[2] had been reviewed and vacated by the U.S. Supreme Court.[3] The case was remanded for further proceedings.

The seven New York judges dutifully complied with the Supreme Court's remand instructions.[4] But the state's highest court then turned to a state law analysis and embellished its majority opinion with the assertion that the New York judiciary recognizes a broad and general constitutional protection for freedom of the press which extends well beyond the minimum levels required by the first and fourteenth amendments to the U.S. Constitution.[5] Additionally, the court shielded its decision from further Supreme Court review by stating plainly[6] that "we decide this case on the basis of State law independently, and that our state law analysis reference to Federal cases is for the purpose of guidance only, not because it compels the result we reach."[7]

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[1] Immuno A.G. v. Moor-Jankowski, N.E.2d 1270, 1278, 18 Med. L. Rptr. 1625, 1631 (1991).

[2] 74 N.Y.2d 548, 560, 549 N.E.2d 129, 135 (1989).

[3] 110 S.Ct. 3266 (1990).

[4] The U.S. Supreme Court's remand instructions and their consideration by the Court of Appeals of New York are discussed *infra* notes 10-13 and accompanying text.

[5] *See, e.g.*, Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.L. Rev. 535, 550 (1986) ("[T]he Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection . . . . [T]he Constitution and the Fourteenth Amendment allow

The libel action in *Immuno* was prompted by a letter to the editor published in the *Journal of Medical Primatology* in 1983. The letter, written by Dr. Shirley McGreal of the International Primate Protection League, was critical of a plan by the Immuno A.G. corporation to conduct hepatitis research using chimpanzees. Immuno A.G. brought a lawsuit against eight defendants. Seven defendants settled with the corporation out of court. Dr. J. Moor-Jankowski, editor of the scientific journal, did not.

In 1989 the case first came before the Court of Appeals of New York, which held that all of the comments attributed to Moor-Jankowski were expressions of opinion that could not support a legal action for defamation.[8] The court arrived at this decision through an application of New York law, which indicates that the initial determination of whether an allegedly defamatory statement constitutes an actionable assertion of fact or a protected expression of opinion should focus upon the tone, content, and apparent purpose of

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diversity only *above and beyond* this federal constitutional floor . . . . While state experimentation may flourish in the space above this floor, we have made a national commitment to this minimum level of protection through enactment of the Fourteenth Amendment.") (emphasis in original).

[6] The source and significance of the "plain statement" in the *Immuno* opinion is discussed *infra* notes 111-21 and accompanying text.

[7] 567 N.E.2d 1270, 1278 (1991). *But see id.* at 1279 (In one seemingly contradictory statement in the majority opinion, Judge Kaye indicates that because of the remand instructions by the U.S. Supreme Court (*see infra* notes 10-13 and accompanying text), the *Immuno* decision rests on both Federal *and* independent state constitutional grounds).

[8] 74 N.Y.2d 548 (1989).

the communication as viewed in context.[9] A year later the state court, in accordance with the Supreme Court's remand directions, reconsidered its *Immuno* ruling in light of the intervening decision in *Milkovich v. Lorain Journal Co.*[10] The New York court first analyzed *Milkovich* and determined that the decision struck the following balance between protection for individual reputation and first amendment protection for media defendants: "except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable."[11] The court then applied its interpretation of *Milkovich* to the facts in *Immuno* and held that its original decision to grant defendant's motion for summary judgment had been proper.[12] The court majority concluded that since no triable issue of fact was revealed through the contextual analysis required under New York law, it was not necessary to apply the U.S. Supreme Court's *Milkovich* standard and examine specific, challenged statements for express and implied factual assertions.[13]

Analysis of cases like *Immuno*, in which a number of first amendment and historical considerations are raised, often lacks contextual perspective. The legal doctrines and conceptual frameworks—developed and shaped over time—which are reflected in a given decision are generally ignored or given only passing reference. Easily overlooked, for instance, is the observation that the New York Court of Appeals' *Immuno* ruling reflects a legal trend which may contribute to principal changes in the litigation of future press freedom cases in the United States. The decision is certainly one of the most obvious examples to date of a "single courageous state"[14] employing the revitalized federalism or states' rights approach[15] in an effort to create a local climate of vigilance and deference concerning the ideals reflected in the term "liberty of the press."[16]

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[9] 567 N.E.2d 1270, 1271 (1991).

[10] 497 U.S. ___, 110 S.Ct. 2695 (1990) (The U.S. Supreme Court in *Milkovich* indicated that there is no "wholesale defamation exemption for anything that might be labeled 'opinion,'" and that expressions of "opinion" which imply an assertion of objective fact may be actionable. *Id.* at 2705).

[11] 567 N.E.2d 1270, 1275 (1991).

[12] *Id.* at 1277.

[13] *Id.* at 1271.

The year 1991 marks the bicentennial of the federal Bill of Rights, the written expression of our most cherished and influential national ideals. But at such a time it should be remembered that the Constitution of the United States is but one of fifty-one American constitutions that describe the powers of government and the rights of the people. Many of the rights enumerated in the first eight amendments to the U.S. Constitution were spelled out in various state constitutions more than a decade before the first Congress met in New

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[14] This phrase comes from Justice Brandeis' oft-quoted dissent promoting the virtues of federalism in New State Ice v. Liebman, 285 U.S. 262, 311(1932).

[15] *See*, Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 Publius 141, 142 (1986) (State high court judges and justices in survey report that rights affirming decisions by state high courts increased 131 percent in the period 1977-1986 over the period 1950-1977). *See also*, Brennan, *supra* note 5, at 548 ("Between 1970 and 1984, state courts have handed down over 250 published opinions holding that the constitutional minimums set by the U. S. Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law.").

[16] 567 N.E.2d 1270, 1278 (1991) (Judge Kaye, author of the *Immuno* majority opinion, uses the term "liberty of the press" rather than "freedom of the press" when analyzing the "nature of the issue" in this case).

York.[17] And the seventy-five recommendations that provided James Madison "with an invaluable list from which to create the [federal] proposals that he submitted to Congress" were the products of the state ratifying conventions.[18] As Madison himself stated, "[t]he valuable improvements made by the American [state] constitutions on the popular models, both ancient and modern, cannot certainly be too much admired."[19]

The point is that the prominent role of state governments and their constitutions, particularly in the area of individual rights, can be seen throughout American constitutional history from the beginning, though the visibility varies with the political climate. The *Immuno* decision, represents a purposeful invigoration of that state role by the New York judiciary. The desire to retain strong, autonomous state governments was a political force in the 1700s that demanded attention. Madison addressed the issue in *Federalist 51*:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence *a double security arises to the rights of the people.*[20]

Two centuries later, the words of Justice Brennan echo those of Madison: "One of the strengths of our federal system is that it provides

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[17] *See* F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, vols. 1-7 (1909).

[18] L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 145 (1988).

[19] The Federalist No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961).

[20] The Federalist No. 51, at 322 (J. Madison) (C. Rossiter ed. (1961) (emphasis added).

a double source of protection for the rights of our citizens."[21] This system of federalism, apparent in the events of 1791, provided the cornerstone for the *Immuno* decision in 1991.

The purpose of this research is not to explain *Immuno*, but to explore how such a decision could come about. The modest goal is to illuminate the present by looking to the past. Consequently, this study uses the court decisions and opinions in *Immuno* for reference and illustration in order to place the current trend of state constitutionalism, and in particular its relationship to the status of press freedom, in historical perspective. This requires consideration of the roots and evolution of federalism, the sometimes adversarial relationship between the states and the federal government in matters of individual rights, and the development of the doctrine of independent and adequate state grounds. An additional thread binds this analysis. The constitutional and jurisprudential history of New York in the area of press freedom is cited as a contributing factor in the *Immuno* decision, so this study highlights selected aspects of this state history to better contextualize the New York Court of Appeals' ruling.

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[21] Brennan, *State Constitutions and the Protection of Individual Liberties*, 90 Harv. L. Rev. 489, 503 (1977) (emphasis added).

A Selected History: Federalism, Individual Rights and the Press

> It has long been recognized that matters of free expression . . . are particularly suited to resolution as a matter of state common law and state constitutional law . . . .[22]
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> *Immuno A.G. v. Moor-Jankowski*, majority opinion (1991)

The controversy over whether the federal government or the states should oversee individual rights in general and freedom of the press in particular is a recurring theme in American jurisprudence. It was reflected in the political writings and speeches of the late eighteenth century, and more than two hundred years and a series of political shifts and judicial trends later, the conflict has yet to be resolved. A brief look at the sequence of constitutional development may help explain the resilience of the state/federal jurisdictional dispute over the definition and protection of expression freedoms.

Two months before announcing Declaration of Independence, the Continental Congress issued resolutions calling for the colonies to adopt new governments independent of all authority under England's Crown.[23] The colonies responded to this challenge by adopting various forms of constitutions.[24] Connecticut and Rhode Island merely revamped their colonial charters, but the other states created new constitutions. Of the twelve state constitutions written and adopted between June of 1776 and October of 1783, only two, including the 1777 Constitution of New York, did not provide for a free press in either the body of the constitution or in a separate bill of rights.[25]

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[22] 567 N.E.2d 1270, 1277 (1991).

[23] *See generally*, G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1176-1787, 131-32 (1969). (According to Wood, the congressional resolution of May 15, 1776, "was the real declaration of independence, from which the measures of early July could be but derivations.").

[24] For an overview of the formation of the first state constitutions, *see* W.P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS, 63-98 (1980). For the texts of these early state constitutions, *see* 1-7 F. THORPE, *supra* note 17. The transition from colonies to states as reflected in the Declaration of Independence is discussed in C. BLOCH, STATES RIGHTS, THE LAW OF THE LAND, 8 (1958).

While the individual colonies were attending to their constitutions, the Continental Congress was creating the Articles of Confederation,[26] the first constitution of the United States, and seeking its acceptance by the states. Though the Congress adopted the Articles in 1777, the ratification process was not completed until the delegates of Maryland signed in 1781. By this time, each of the states had adopted some form of constitution. The Articles of Confederation reflected the revolutionists' distrust of an ambitious national government, a sentiment which had grown steadily over the course of colonial history.[27] Article II declared that "[e]ach State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States . . . ."[28] Thus, the "central government was given specific and sharply circumscribed powers," while the states "retained for themselves that vast area of unspecified, unenumerated powers, the twilight zone wherein constitutional governments function most largely."[29]

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[25] *See* L. LEVY, *supra* note 18, at 155. *See also* Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 464 n. 54 (1983). *See also* W.P. ADAMS, *supra* note 24, at 93-94 (Inhabitants of the territory which would later become Vermont developed a constitution in 1777, but the state was not admitted to the Union until 1791). *See also* 5 F. THORPE, *supra* note 17, at 2623-2638 (The New York Constitution of 1777 did not include a bill of rights. Some individual freedoms, such as "the liberty of conscience," were incorporated within the body of the constitutional text).

[26] 1 F. THORPE, *supra* note 17, at 9-17.

[27] *See generally*, M. JENSEN, THE NEW NATION, at 18-27 (1981) (Jensen argues that American distrust of a strong central government existed long before the fight for independence).

[28] 1 F. THORPE, *supra* note 17, at 10.

But in the summer of 1787, delegates from the states gathered in Philadelphia in response to the consensus recognition that the federal powers, jurisdiction, and rights articulated in the Articles of Confederation were not sufficient to meet the needs of the unified states.[30] Opinions differed concerning a suitable remedy. As "John DeWitt," a critic of the Constitution observed two months after the convention, the framers "had local prejudices to combat, and in many instances, totally opposite interests to consult. Their situations, their habits, their extent, and their particular interest, varied each from the other."[31]

Individual differences notwithstanding, a general confrontation between those leaning more toward a strong national government and those equally concerned with retaining states' rights was inevitable when the delegates set about redefining the extent of federal authority.[32] And it was soon apparent that James Madison and those who shared his nationalist vision were not contemplating "a mere revision and amendment of our first [Articles of] Confederation, but a compleat System for the future government of the United States."[33]

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[29] M. JENSEN, *supra* note 27, at 25.

[30] *See*, G. WOOD, *supra* note 23, at 471. *See also*, C. BLOCH, *supra* note 24, at 10-11.

[31] THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, 193 (R. Ketcham ed. 1986) (hereinafter THE ANTI-FEDERALIST PAPERS). The complexity of the issues and personalities involved with the constitutional formation and/or ratification processes demands judicious application of the terms "Federalist" and "Anti-Federalist." For an in-depth analysis on this subject *see generally* F. MCDONALD, NOVIS ORDO SECLORUM, THE INTELLECTUAL ORIGINS OF THE CONSTITUTION, (1985); C. ROSSITER, 1787 THE GRAND CONVENTION, (1966); R. RUTLAND, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788 (1966).

[32] For a discussion of the reasons for and purpose of the 1787 Constitutional Convention, *see generally* C. ROSSITER, *supra* note 31; C. BLOCH, *supra* note 24, at 10-25.

In retrospect, it appears that the exact nature of the states' role under the restructured and fortified common authority was the primary issue before the convention.[34] The behavior of the New York delegation illustrates the depth of the controversy. The only representative from that state to sign the new Constitution in Philadelphia was Alexander Hamilton. Two other delegates, Robert Yates and John Lansing, had left the federal convention abruptly in protest of the form being taken by the proposed new government.[35] Questions concerning the extent of state autonomy in the new federal system were not retired with the acceptance of the Constitution by the remaining Philadelphia delegates. Several attempts were made during the convention to protect freedom of the press and other individual rights from the emerging central government. On Aug. 20, 1787, Charles Pinkney submitted a list of thirteen proposals, including a provision that the "liberty of the Press shall be inviolably preserved," which died quietly after it was referred to a committee.[36] More than three weeks later, a proposal to create a committee charged with compiling a bill of rights was unceremoniously squelched.[37] After a final motion to include a press clause was defeated by a vote of seven states to four,[38] the Constitution was adopted without explicit protection for the press.

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[33] THE ANTI-FEDERALIST PAPERS, *supra* note 31, at 194.

[34] *See generally*, F. MCDONALD, *supra* note 31, at 186.

[35] *See generally*, THE ANTI-FEDERALIST PAPERS, *supra* note 31, at 336.

[36] 2 B. SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS, 437-38 (1980).

[37] *Id.* at 438.

Opponents of the proposed Constitution expressed concern about the lack of a bill of rights before, during and at the state ratifying conventions.[39] Madison countered this popular objection by insisting that the federal government had neither reason nor authority to intrude into the area of liberties associated with bills of rights and that the powers retained by the states were numerous and indefinite: "The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State."[40] Some Federalists maintained that a bill of rights might actually reduce state autonomy by implying that the federal government had authority in areas not enumerated in the Constitution.[41]

Despite such reassurances, amendments to the Constitution were debated at the constitutional ratifying conventions in nine states. Six states determined that the Constitution should be amended. But only three of the amendment proposals, those of Virginia, North Carolina and New York, included a provision designed to protect the press from federal interference.[42] New York's recommended press clause simply stated "[t]hat Freedom of the Press ought not to be violated or restrained."[43]

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[38] *Id.* at 439.

[39] *But see* Anderson, *supra* note 25, at 469 ("The role of the press clause—indeed of the entire bill of rights—in the ratification controversy must be appraised with some skepticism, however. The motives of those clamoring for a bill of rights were complex.").

[40] The Federalist No. 45 at 292-93 (J. Madison) (C. Rossiter ed. 1961).

[41] *See, e.g.*, Anderson, *supra* note 25, at 466-67; R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 106-25 (1955).

New York was indeed a scene of intense debate over the proposed Constitution. Those supporting the Constitution saw their Federalist views articulated by "Publius" in a series of essays written by Madison, Hamilton and John Jay, which appeared in New York City newspapers in 1787 and 1788.[44] The Anti-federalist writings of "Cato," "Brutus," "The Federal Farmer" and "Centinel" used the Philadelphia and New York newspapers to counter the Federalist position.[45] The question of press freedom was broached on both sides. Federalist James Wilson declared that "the proposed system possesses no influence whatever on the press,"[46] while "Centinel" warned that acceptance of the Constitution "would assure that the state constitutions could not provide protection 'for the *liberty of the press and other invaluable personal rights*.'"[47]

Federalists were outnumbered at the New York ratifying convention 46-19. But as the state convention opened, the delegates received news that the requisite number of states already had ratified the Constitution and ensured that it would take effect. This knowledge may have greatly facilitated its acceptance by a narrow New York majority on July 26, 1788.[48] Still, the New York endorsement of the Constitution was tempered with a list of recommended amendments[49] and the accompanying declaration that "every power, jurisdiction and right which is not by the said Constitution clearly delegated to the United States of America . . . remains to the people of the several States, or to their respective State governments."[50]

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[42] For a compilation of the relevant information from each of the state ratifying conventions *see* 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, 627-982 (1971).

[43] *New York Proposed Amendments* (1788) *Id.* at 911, 913.

[44] *See* THE FEDERALIST PAPERS, (C. Rossiter ed. 1961).

[45] *See* THE ANTI-FEDERALIST PAPERS, *supra* note 31.

[46] *An Address to a Meeting of the Citizens of Philadelphia* (1787), in 1 B. SCHWARTZ, *supra* note 42, at 529.

[47] PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1778-1788, at 576 (J. McMaster & F. Stone eds. 1888) (emphasis in original).

In June of 1789, the First Congress, meeting in New York, turned in earnest to the subject of constitutional amendments. Madison was responsible for the introduction of amendments in Congress, and his list included two proposals concerning freedom of the press. One of these emerged in what we now call the first amendment. Madison's other press clause appeared in an amendment aimed directly at state authority over specific individual rights: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[51] This frontal assault on the doctrine of federalism, which Madison referred to as the most important of his proposals, was adopted by the House but rejected by the Senate.[52] South Carolina Representative Thomas Tucker anticipated the predominant Senate view of the proposal with his statement to the House that the Congress would be advised to "leave the State Governments to themselves, and not . . . interfere with them more than we already do."[53] The "legislative intent," to limit only federal and not state authority concerning freedom of the press and other individual rights, "could hardly be more clear."[54]

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[48] *See* THE ANTI-FEDERALIST PAPERS, *supra* note 31, at 336.

[49] *New York Proposed Amendments* (1788), in 2 B. SCHWARTZ, *supra* note 42, at 911, 913.

[50] C. BLOCH, *supra* note 24, at 20.

[51] 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 451 (1789) (J. Gales ed. 1834) (hereinafter ANNALS).

[52] *See* Anderson, *supra* note 25, at 483-84.

In the end, the Bill of Rights was the product of three congressional committees and two Senate revisions. The first amendment alone was revised five times and the final language was a compromise.[55] The Congress ultimately agreed to twelve amendments, ten of which were ratified by the required number of states and became law. The essential form of the central government was finally in place and empowered,[56] and the concept of federalism was still alive. The state governments had retained enough power, especially in matters of individual rights, to ensure a role in the evolution of the new government system.[57]

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[53] 1 ANNALS, *supra* note 51, at 783.

[54] Anderson, *supra* note 25, at 485.

[55] *See generally, id.* at 476. *See also,* 1 ANNALS, *supra* note 51, at 452, 759, 948.

[56] *See id.* at 485, note 187 for a discussion of the debate over when the Bill of Rights took effect. Dec. 15, 1791, is generally accepted as the date on which the federal Bill of Rights was ratified.

[57] *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Compare this language with Art. II of the Articles of Confederation at *supra* note 28 in accompanying text).

Evolution of Federalism

> Inasmuch as the Supreme Court is charged with the ultimate responsibility for pronouncing federal law . . . it should be given the opportunity to accept, modify or reject a State court's determination of what the Federal Constitution requires.[58]
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> *Immuno A.G. v. Moor-Jankowski*, concurring opinion (1991)

The concepts of dual sovereignty and double security—the federal government acting only within the limits of its delegated authority while the states presided over "ordinary matters" concerning the lives, liberties and properties of the people—got the judicial seal of approval in *Barron v. Baltimore* (1833).[59] Chief Justice John Marshall's opinion endorsed the system of federalism in the field of civil rights, making it clear that the limitations set out in the federal Bill of Rights applied to the federal government exclusively and did not represent a threat to state autonomy:

> Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictates . . . . [The provisions in the federal Bill of Rights] are limitations of [the] power granted in the instrument itself; not of distinct governments, framed by different persons for different purposes.[60]

Under this model of dual sovereignty, the federal Bill of Rights protected individuals from the federal government, while the state constitutional provisions protected citizens (to varying degrees) from state authority. This dual system was accepted by the courts until the

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[58] 567 N.E.2d 1270, 1285 (1991) (Simons, J., concurring) (Judge Simons agreed with the majority decision to affirm the earlier *Immuno* ruling but thought the judgment should have been affirmed on federal constitutional grounds alone).

[59] 32 U.S. (7 Pet.) 243 (1833).

[60] *Id.* at 247.

Civil War era, when state autonomy "came to be seen not as a means to protect the individual from government abuse but rather as the primary source of that abuse."[61] The end of the Civil War brought a new spirit of nationalism to much of the nation, and the bounds of state autonomy changed with the post-war adoption of the thirteenth,[62] fourteenth,[63] and fifteenth[64] amendments.

These amendments can be viewed as a more comprehensive version of the state-action amendment proposed by Madison for inclusion in the federal Bill of Rights. Madison's original idea of using the federal Constitution to uniformly regulate state power resurfaced in the post-war amendments with greater potential for limiting states' rights. Where his earlier proposal had been restricted to certain specified rights, the scope of the three Reconstruction Amendments, especially the fourteenth, appeared to be unlimited.[65] But the Supreme Court did not immediately invoke the new amendments to extend the sphere of the individual liberties enumerated in the federal Bill of Rights on a national level. Five years after the ratification of the fourteenth amendment, the Court appeared to dismiss entirely the suggestion that the privileges and immunities clause referred to any of the provisions found in the federal Bill of Rights.[66]

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[61] *Section 1983 and Federalism*, 90 Harv. L. Rev. 1135 (1977).

[62] U.S. Const. amend. XIII (This amendment, ratified in 1865, outlawed slavery "within the United States, or in any place subject to their jurisdiction.").

[63] U.S. Const. amend. XIV (This amendment, ratified in 1868, states in part that "No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[64] U.S. Const. amend. XV (This amendment, ratified in 1870, gave all citizens of the United States the right to vote).

[65] *See generally*, Project Report: *Toward an Activist Role for State Bills of Rights*, 8 Harv. C.R.-C. L. L. Rev. 280 (1973) (hereinafter Project Report).

Due perhaps to the sweeping ambiguity of the language and of the phrase "privileges and immunities" in particular, the fourteenth amendment was subject to an early, narrow application which simply required the states to grant all citizens the equal protection of whatever rights the states chose to establish.[67] This view was reaffirmed in *United States v. Cruikshank* (1876) when the Court held that the first amendment right to assemble and to petition for redress of grievances was nationally applicable only if the petition was directed to the federal government.[68]

Deference to state autonomy in the area of freedom of expression was generally practiced by the courts well into this century. In 1921, for example, the Supreme Judicial Court of Maine stated that "[t]he Federal Declaration of Rights not only restrains Congress from enacting any statute restraining religious freedom or freedom of speech but, by necessary implication, leaves those matters to be dealt with by the sovereign power of the several States."[69]

But the traditional system of federalism was forever altered following the U.S. Supreme Court decision in *Gitlow v. New York* (1925).[70] The Court suggested in *Gitlow* that the states were no longer free to set the standards for abuse of free expression and that the first amendment freedoms of speech and press were henceforth shielded from state impairment by the due process clause of the fourteenth amendment.[71] With its subsequent decisions the Court soon vitalized this *dictum*,[72] and sixteen years after *Gitlow*, Justice Frankfurter observed that "[i]n a series of opinions as uncompromising as any in its history, this Court has settled that the fullest opportunities for free expression are 'implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment,' protected against attempted invasion by the states."[73]

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[66] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-81 (1873).

[67] *See generally, Section 1983 and Federalism*, 90 Harv. L. Rev. 1146, 1158 (1977).

[68] 92 U.S. 542 (1876).

[69] State v. Mockus, 120 Me. 84, 113 A. 39 (1921).

[70] 268 U.S. 652, 45 S.Ct. 625 (1925).

In the years following *Gitlow*, the federal judiciary continued "incorporating" the federal Bill of Rights provisions within the scope of the fourteenth amendment. States' rights in the field of freedom of expression were largely pushed into the background as the Supreme Court, interpreting the Federal Constitution, assumed the responsibility of formulating national standards for freedom of speech and press.[74] A major milestone of this incorporation era, according to many observers including Justice Brennan,[75] was the Supreme Court ruling in *Mapp v. Ohio*.[76] This decision, which applied the fourth amendment search and seizure of evidence restrictions to the states, was attacked by critics who argued "that it offended principles of federalism and symbolized the Court's determination to impose a

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[71] *Id.* at 666.

[72] *See, e.g.*, Whitney v. California, 274 U.S. 357, 371 (1927); Fiske v. Kansas, 274 U.S. 380, 387 (1927).

[73] Bridges v. California, 314 U.S. 252, 281-82 (1941) (Frankfurter, J., dissenting).

[74] *See generally, Freedom of Expression Under State Constitutions*, 20 Stan. L. Rev. 326 (1968).

[75] *See* Brennan, *supra* note 5, at 540-41.

[76] 367 U.S. 643 (1961).

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national system of individual rights at the expense of traditional state controls."[77] Brennan, himself an advocate of state constitutional protection for individual rights,[78] had addressed this line of criticism five years before *Mapp*. In a dissenting opinion written in 1956, he cautioned that the trepidation engendered by a cry of "states' rights" should not cause the judiciary to "administer a watered-down, subjective version of the individual guarantees of the Bill of Rights" when state cases come before the Supreme Court.[79]

During the 1950s and 1960s, the Supreme Court accelerated the incorporation process and applied to the states most of the protections guaranteed by the federal Bill of Rights.[80] The activist trend of the federal judiciary so dominated the field of individual rights during the Warren Court era "that a turn to state constitutional rights litigation appeared to be remote, if not out of the question by the late 1960s."[81] But with the Burger Court's assumption of a less activist posture in the protection of individual rights and liberties, the 1970s saw a "phoenix-like resurrection of federalism, or . . . states' rights, evidenced by state courts' reliance upon provisions of state constitutions."[82]

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[77] Brennan, *supra* note 5, at 541.

[78] *See, e.g.*, Brennan, *supra* note 5; Brennan, *supra* note 21; Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. Rev. 761 (1961).

[79] Ohio *ex. rel.* Eaton v. Price, 364 U.S. 263, 275 (1956) (Brennan, J., dissenting from the judgment of an equally divided court).

[80] *See, e.g.*, Project Report, *supra* note 65, at 281-84.

[81] Collins, Galie & Kincaid, *supra* note 15, at 160.

[82] S. Mosk, *The State Courts*, in AMERICAN LAW: THE THIRD CENTURY, 213, 216 (B. Schwartz ed. 1976).

> Turning our back on the now fully developed, controlling State law issues would be of no service to the [U.S.] Supreme Court, or the litigants, or the law of this State.[83]
>
> *Immuno A.G. v. Moor-Jankowski*, majority opinion (1991)

In 1986, Justice Brennan told the Executive Committee of the American Society of Newspaper Editors that he viewed the "the rediscovery by state supreme courts of the broader protection afforded their own citizens by their state constitutions . . . [as] probably the most important development in constitutional jurisprudence of our times."[84] This development, according to Brennan, means that the "state laboratories are once again open for business."[85] It is within this broad context of state "rediscovery" that the *Immuno* decision must be evaluated.

Justice Harlan's observation in *Williams v. Florida*, that the "Fourteenth Amendment tempered the basic philosophy but did not unstitch the basic federalist pattern woven into our constitutional fabric,"[86] was indicative of an element resurfacing in the federal judiciary during the early 1970s that was more open to independent state activism. And Chief Justice Rehnquist's statement that "[in] the fields of liberty as well as property, the states must be left to work out their own destinies within broad limits,"[87] suggests that while the current Supreme Court may interpret the Federal Constitution narrowly, the state courts may continue to experience an era of relative autonomy.

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[83] 567 N.E.2d 1270, 1279-80 (1991).

[84] Brennan, Speech to the Executive Committee of the American Society of Newspaper Editors, at 21-22 (Oct. 10, 1986) (author will provide this text upon request).

[85] Brennan, *supra* note 5, at 550.

[86] 399 U.S. 78, 133 (1970) (Harlan, J., concurring).

But the state courts have varied in their willingness to actively employ the "new" federalism in cases raising constitutional issues.[88] This diversity can be attributed to several interrelated factors including regional tendencies,[89] political culture[90] and the method by which state high court justices are selected.[91] Some state courts turn consistently to their state constitutions and laws in attempting to resolve rights cases on independent state constitutional grounds. High state courts in New York, New Jersey, Oregon, Mississippi, Montana, Utah, Vermont, Washington and Wisconsin, for example, "repeatedly have broken ranks with the U.S. Supreme Court and its increasingly restrictive attitudes toward civil rights and liberties."[92] Other state courts have traditionally shied away from independent state constitutional analysis and appear content to parallel the federally established levels of rights protection.

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[87] Rehnquist, Quoted in Lardner, *50s Memos Illustrate Rehnquist Consistency*, Washington Post, July 20, 1986 p.1 col. 4 at p. 14, col. 4 (cited in Collins, *Looking to the States*, Natl. L. Jour. Sept. 29, 1986, at p. s-2).

[88] *See generally*, Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, in 71 Judicature 100, 102-4 (1987).

[89] *See, e.g.*, Collins, Galie & Kincaid, *supra* note 15, at 147 (This 1986 study found that in the Northeast region, which includes New York, state high court judges and justices have reported "significant-to-moderate" increases since 1980 in individual rights litigation based on state constitutional law).

[90] *See, e.g.*, Cal. Const. art. 1 § 24 (This constitutional provision reflects a state political culture that appears to encourage, or even require, courts to practice independent state constitutional interpretation: "Rights declared in this constitution are not dependant on those guaranteed in the U.S. Constitution.").

[91] *See, e.g.*, Collins, Galie & Kincaid, *supra* note 15, at 151 (1986) (Study found that "[j]ustices from courts in which the formal method of selection is appointment were much more likely than other respondents to report a significant increase in the number of individual rights cases litigated under their state constitution since 1980.").

[92] Kannar, *Conservative Logic*, Natl. L. Jour., Sept. 29, 1986, Special Section: State Constitutional Law, at p. s-6.

The individual rights cases reflecting the revitalized state activism cover a range of legal issues. A 1986 research project evaluated more than three hundred decisions in which "state high courts independently relied on their own state constitutions to allow for either an equivalent or broader measure of individual rights protection than currently recognized by the U.S. Supreme Court in interpreting the federal Constitution."[93] These cases, the vast majority of which were decided after 1970, were categorized under two general headings: "criminal justice" and "civil liberties." Most of the cases collected were grouped in the criminal justice section under such subheadings as "search and seizure," "double jeopardy," and "self-incrimination." In the civil liberties section, gender discrimination (including state equal rights amendments) represented the most active area of litigation.

Only about thirty-five cases collected in the study appear to be related directly to freedom of expression issues. This number includes decisions that recognized a right of access to public forums[94] and those involving speech-related crimes.[95] Perhaps a dozen cases touched directly on freedom of the press, and the majority of these dealt with issues such as public and press access to court proceedings[96] and reporter shielding of confidential sources.[97] A cursory analysis of this 1986 compilation of state cases suggests that decisions pertaining to freedom of the press represent only a small percentage of the several hundred decisions reached on independent state constitutional grounds from the early 1970s through the mid-1980s. The 1991 *Immuno* ruling can be distinguished from nearly all the press cases decided on independent state grounds during the previous two decades because it concerned a libel action.[98]

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[93] Collins & Galie, *Cases*, Natl. L. Jour., Sept. 29, 1986, Special Section: State Constitutional Law, at pp. s-8-14. (There is a need for an updated study of this nature that would incorporate within this framework the independent states' rights decisions of the last five years).

[94] *See, e.g.*, Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Cal. 1979).

[95] *See, e.g.*, State v. Blair, 611 P.2d. 569 (Or. 1979).

It should be noted that the Court of Appeals' decision to rest its *Immuno* ruling on an interpretation of state constitutional law was not an isolated incident in New York. The independent spirit of the state that was so evident in the events of the 1700s is alive and, in fact, flourishing today. In the early 1970s, when a number of state courts were just beginning to "shed the robes of judicial acquiescence,"[99] a team of researchers assessing the status of state bill-of-rights litigation found that the "New York courts have consistently recognized the importance of their state bill of rights."[100] The study revealed a New York judiciary active in diverse areas that included protecting the rights of criminal defendants, indigents, juveniles and people diagnosed as having serious mental disorders.[101]

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[96] *See, e.g.*, Kearns-Tribune Corp. v. Lewis, 685 P.2d. 515 (Utah 1985).

[97] *See, e.g.*, *In re* Wright, 700 P.2d. 40 (Idaho 1985).

[98] The 1986 compilation of more than 300 rights cases, supra note 93, decided on independent state constitutional grounds between 1970 and 1986 included only one libel case, Wheeler v. Green, 593 P.2d. 777 (Or. 1979), which dealt with the question of punitive damages in a defamation action.

[99] Welsh & Collins, *Taking State Constitutions Seriously*, The Center Mag. 6 (Sept./Oct. 1981).

[100] Project Report, *supra* note 65, at 341.

Several of the legal areas in which the revitalized federalism has been most prominent nationally are reflected in a series of decisions by the New York courts in the 1980s. In the past ten years, the state courts have turned to the state constitution for independent guidance in cases involving search and seizure,[102] drug testing[103] and access to public forums.[104] Other New York court decisions resting on state grounds during this period addressed press issues such as newsgathering and reporter's privilege.[105] While these were not libel cases, they established procedural precedent within the New York judiciary for resolving press cases through independent analysis of the state constitution without relying on its federal counterpart. The state Court of Appeals built upon this body of law with its *Immuno* decision, and thus extended the scope of New York press decisions based on adequate and independent state grounds into the field of libel.

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[101] *Id.*

[102] *See* People v. Stith, 69 N.Y.2d 313; 506 N.E. 2d 911; 514 N.Y.S. 2d 201 (1987); People v. Belton, 55 N.Y.2d 49; 432 N.E.2d 745; 447 N.Y.S.2d 873 (1982).

[103] *In re* Patchogue-Medford Congress of Teachers v. Bd. of Educ. of the Patchogue-Medford Union Free Sch. Dist., 70 N.Y.2d 57; 510 N.E.2d 325; 517 N.Y.S.2d 456 (1987).

[104] Shad Alliance v. Smith Haven Mall, 106 A.D.2d 189; 484 N.Y.S.2d 849 (1985).

[105] *See* Beach v. Shanley, 62 N.Y.2d 241; 465 N.E.2d 304; 476 N.Y.S.2d 765 (1984) and O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521; 523 N.E.2d 277; 528 N.Y.S.2d 1 (1988).

Adequate and Independent State Grounds

> Had defendant initially presented the issue as one of independent state constitutional law, instead of as an undenominated argument premised on the assumed identity of State and Federal law, it might have been resolved on that basis a year ago.[106]
>
> *Immuno A.G. v. Moor-Jankowski*, majority opinion (1991)

The new federalism has relied to great extent on the specific practice of resting state court decisions on adequate and independent state grounds. This doctrine provides the courts with a standard for "reconciling the respective claims of the state for independence of state law and of the national government for review of interpretations of federal law."[107] Seeds of the adequate and independent state grounds test appeared in *Murdock v. City of Memphis* (1875),[108] in which the U.S. Supreme Court indicated that unless a case raises a question of federal law that is germane to the decision, the federal courts should not presume jurisdiction. The Court in 1945 clarified this standard with the declaration that "[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."[109]

While this standard might have appeared rather clear on the surface, the courts found the depths of the doctrine murky. It is not always readily apparent whether a state court decision is grounded in state or federal law. The Supreme Court, when faced with such ambiguity, has had several options. "It could dismiss the case. It could vacate the decision and send the case back to the state court to clarify the grounds. It could order a continuance and direct the petitioner to obtain clarification from the state court. Finally, the Court itself could determine which constitution the state court relied upon."[110]

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[106] 567 N.E.2d 1270, 1278 (1991).

[107] Abrahamson & Gutmann, *The New Federalism: State Constitutions*, 71 Judicature, 96 (1987).

[108] 87 U.S. (20 Wall.) 590 (1875).

[109] Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

In 1983, the Supreme Court appropriately acknowledged that "a satisfying and consistent approach for resolving this vexing issue" had not been developed and that the "ad hoc method of dealing with cases that involve possible adequate and independent state grounds [was] antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[111] The Court attempted to remedy the inconsistency with its majority decision in *Michigan v. Long*.[112] The *Long* majority opinion indicates that when rulings "appear to rest primarily on federal law," appear to be "interwoven with the federal law," or when the "adequacy and independence of any possible state law ground" is not clearly set out in the state court opinion, the Supreme Court will assume that any federal issue in question is central to the case, and the decision will be subject to federal review.[113] But a state court can insulate rulings from review by including in its judgments or opinions a "plain statement" indicating that a decision is "based on bona fide separate, adequate, and independent [state] grounds," and that any federal cases cited as precedent are relied on only for guidance "and do not themselves compel the result that the court has reached."[114] The *Long* majority reasoned that this approach would provide state judges with a clear opportunity to develop state jurisprudence without federal interference.[115]

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[110] Abrahamson & Gutmann, *supra* note 107, at 96.

[111] Michigan v. Long, 463 U.S. 1032, 1038-39 (1983).

[112] *Id.* at 1032 (O'Conner, J., delivered the majority opinion joined by Burger, C.J., White, Powell, and Rehnquist, JJ.)

[113] *Id.* at 1040-41.

An examination of *Immuno's* travels through the courts illustrates the practical implications of the new "ground rules" for federalism set out in *Long*.[116] The initial opinion of a unanimous New York Court of Appeals in *Immuno*, delivered in 1989, cited a variety of state and federal cases which bear directly on modern defamation litigation.[117] The opinion also included several references to constitutional protection for freedom of expression but failed to distinguish between state and federal guarantees. These factors, combined with the lack of a plain statement indicating the precise constitutional grounds for the opinion, allowed the Supreme Court to review the decision, vacate the judgment and remand the case for further consideration as directed.[118] This process is indicative of the federal judicial presumption following *Long* "that a state court's decision does *not* rest on independent and adequate state grounds, and a state court must clearly rebut that presumption if it wishes to insulate its decision from federal review."[119]

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[114] *Id.* at 1041.

[115] *Id.*

[116] Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between Federal and State Courts*, 63 Tex. L. Rev. 977, 993 (1985).

[117] 74 N.Y.2d. 548, 549 N.E.2d. 129 (1989) (The federal cases cited included New York Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[118] 110 S. Ct. 3266 (1990).

[119] Abrahamson & Gutmann, *supra* note 107, at 97 (emphasis in original).

The second *Immuno* decision indicates the New York Court of Appeals' recognition of the judicial reality that "[i]n light of *Long*, state law decisions lose their independent staying power and finality absent formal compliance with the court's new rule."[120] This time the majority opinion included a plain statement indicating that the case was decided on the basis of "State law independently" and that reference to federal cases "is for the purpose of guidance only."[121] The similarity between this statement and the Supreme Court's formula for such a statement in *Long* suggests that the New York court's 1991 *Immuno* decision rests upon solid, independent state ground. This is especially interesting considering the way in which the court evaluated, but essentially dismissed, the appropriateness of the Supreme Court's remand instructions:

> The Supreme Court has specifically directed us to consider the case in light of *Milkovich*, and we comply with that direction . . . . But that does not compel us to ignore our prior decision or the arguments fully presented on remand that provide an *alternative basis for resolving the case* . . . . We therefore proceed to resolve the case . . . independently as a matter of state law . . . .[122]

The court majority apparently found such temerity warranted after drawing its own conclusion that *Milkovich* effected no change in the law.[123]

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[120] Collins, *supra* note 87, at p. s-2.

[121] The plain statement of the New York Court of Appeals appears at *supra* note 7 in accompanying text.

[122] 567 N.E.2d 1270, 1279-80 (1991) (emphasis added).

[123] *Id.* at 1278.

The *Immuno* Factors

> [W]hether by the application of "interpretative" (*e.g.*, text, history) or "non-interpretative" (e.g., tradition, policy) . . . factors, the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by" the Federal Constitution.[124]
>
> *Immuno A.G. v. Moor-Jankowski*, majority opinion (1991)

The New York Court of Appeals in *Immuno* relied on several techniques which have been suggested to state courts or lawyers involved with bill of rights cases for developing decisions or arguments based on independent and adequate state constitutional grounds.[125] In particular, the majority opinion emphasized both the textual differences between the state and federal constitutional press clauses and the specific history and traditions of New York regarding the protection of the liberty of the press.

The fact that the New York Constitution of 1777 did not contain a press clause actually enhanced the state court's ability more than two centuries later to develop a line of reasoning in *Immuno* based on the textual differences between the federal and state press provisions. Not until 1821 did the state adopt a clause constitutionally protecting freedom of the press. Art. VII, § 8, of the 1821 Constitution of New York reads:

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[124] *Id.* (Quoting from O'Neill v. Oakgrove Construction, Inc., 71 N.Y. 2d at 529 (1988)).

[125] *See, e.g.*, Project Report, *supra* note 65, at 315-19; Copple, *The Dynamics of Expression Under the State Constitutions*, 64 Journalism Quarterly 108 (1987) (Copple identifies six factors to be considered when deciding whether or not to "deviate from established First Amendment doctrine": 1) institutional differences, 2) constitutional text, 3) state history and traditions, 4) federal occupation of the field, 5) other state interpretations, 6) national uniformity).

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.[126]

Nearly 170 years later, Judge Kaye, writing for the New York Court of Appeals majority in the second *Immuno* decision declared that

> [t]hose words, unchanged since the adoption of the constitutional provision in 1821,[127] reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment adopted 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms.[128]

The court's explanation of the original intent driving the state's press clause suggests that from the beginning, the provision did not lend itself to a parallel interpretation with the first amendment press clause, but was meant instead to establish an independent level of protection for freedom of expression in New York. The court then extended the historical/textual argument, stating that the formulation and adoption of the state press provision prior to the Supreme Court's application of the First Amendment to the states calls for "particular vigilance by the courts of this state in safeguarding the free press against undue interference."[129]

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[126] Art. VII, § 8, New York Const. of 1821, 5 F. THORPE, *supra* note 17, at 2648.

[127] This same press clause now appears in N.Y. Const. art. I (Bill of Rights), § 8.

[128] 567 N.E.2d 1270, 1277 (1991).

[129] *Id.* (Quoting from O'Neill v. Oakgrove Construction, Inc., 71 N.Y. 2d 521, 528-9 (1988). The *O'Neill* case concerned reporter's privilege).

But Judge Kaye added that "[w]hile we look to the unique New York State constitutional text and history, our analysis is also informed by the common law of this State . . . . [W]e look to our State law because of the nature of the issue in controversy—liberty of the press—where this State has its own exceptional history and rich tradition."[130] There is certainly evidence to support the court's observation.

Most obvious, perhaps, is the 1735 sedition trial of John Peter Zenger, printer of the *New York Weekly Journal.* Not a few legal texts see the New York *Zenger* decision as essentially eliminating the threat of seditious libel charges as a means for controlling the press in America.[131] Near the end of his long plea on Zenger's behalf, lawyer Andrew Hamilton reminded the jury that "it is not the cause of a poor printer, nor of New York alone, which you are trying . . . . [N]ature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power in these parts of the world at least, by speaking and writing truth."[132] In 1985, two and one half centuries after the Zenger trial, an unrestrained *New York Times* editorialist proclaimed that the decision had established press freedom in the state, and perhaps in the nation:

> This day demands a tribute, professional as well as patriotic, to John Peter Zenger, the publisher of New York's first

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[130] 567 N.E.2d 1270, 1278 (1991).

[131] *See, e.g.*, H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS, 37 (1986); M. FRANKLIN & D. ANDERSON, MASS MEDIA LAW, 11 (1990). *But see*, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, (L. Levy ed. at xxx-xxxi (1966) (Levy argues that the *Zenger* decision had "little if any appreciable effect upon the freedom of the press in New York or elsewhere in the colonies.").

[132] A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 99 (Stanley Katz ed. 1963).

> independent newspaper, and Andrew Hamilton, his wily Philadelphia lawyer. For today is the 250th anniversary of the libel trial at which they turned common law on its head and established the freedom of our press.[133]

While this editorial may inflate the historical importance of *Zenger*, it certainly illustrates how popular interpretation of the decision enriches New York's tradition regarding *Immuno's* issue in controversy.

The New York case of *People v. Croswell*,[134] another textbook staple, further contributed to this history. The 1804 *Croswell* decision paved the way for legislative acceptance the following year of a bill,[135] later written into the New York Constitution,[136] which provided that the truth could be raised and recognized as a defense in New York libel litigation. But the impact of *Croswell* was not confined to New York.[137] "Numerous scholars, legal as well as nonlegal, have cited the state case with approval again and again as one of the very significant judicial decisions on criminal libel law."[138]

New York's exceptional history and rich tradition in the protection of press liberty, as reflected in such occurrences as the *Zenger* and *Croswell* trials, was a significant factor in the eyes of the *Immuno* majority. When this factor was considered in conjunction with the court's interpretative textual analysis of federal and state press provisions, a majority of the New York court judges were convinced that the decision properly rested on independent state grounds.

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[133] New York Times, Aug. 4, 1985, at 20E.

[134] 3 Johns. Cas. 307 (N.Y. Sup. Ct. 1804), *reprinted in* 1 N.Y. Common Law Rep. App. 717-41 (1883).

[135] 1805 N.Y. Laws ch. 90 § II.

[136] 5 F. THORPE, *supra* note 17, at 2648.

[137] *See generally*, Youm, *The Impact of People v. Croswell on Libel Law*, 113 Journalism Monographs 21-23 nn. 120-149 (1989) (Youm lists 29 states "which have followed New York in providing for truth as a qualified defense against libel in their constitutions or statutes—or both.").

[138] *Id.* at 9.

Conclusion

> Under our system of federalism, the state courts have both the privilege and the responsibility of enunciating the state's law and providing the first line of protection for the people's liberties.[139]
>
> *Immuno A.G. v. Moor-Jankowski*, concurring opinion (1991)

Through close examination of the New York Court of Appeals' opinions in *Immuno A.G. v. Moor-Jankowski*, it becomes clear that the case involves more than would seem apparent on the surface. The historical background of such independent state constitutional interpretations in rights litigation is indeed rich. The roots of federalism run deep in American jurisprudence, though the degree of state activism has fluctuated over the centuries. But with the continuing evolution of the doctrine of independent and adequate state grounds, the state courts are once again wielding the "powerful legal tool" of state constitutional interpretation with precision and with seemingly increasing levels of consistency and confidence.[140] Rights litigation in such areas as criminal law, privacy, and gender discrimination has already felt the impact of the state "re-awakening," and it appears that media law will be, if it has not already been, similarly affected.

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[139] 567 N.E.2d 1270, 1287 (1991) (Titone, J., concurring).

[140] Copple, *supra* note 125, at 113.

In either case, independent reliance on state law in cases involving the press has significant potential for expansion, particularly if state courts elect to adopt a line of legal reasoning similar to the approach employed by the New York court in *Immuno.* Forty-three state constitutions have freedom of speech and press provisions "fundamentally different from the first amendment."[141] This textual diversity alone allows states to interpret their own constitutions as providing protections for the press beyond the federally established minimums.[142]

The obvious fact that traditions and histories of individual states in protecting liberty of the press vary greatly may preclude some states from using this line of reasoning in attempts to develop an independent body of state constitutional law; "most state courts have very little to guide their interpretation of the state constitution other than a body of state law dependent primarily on the U.S. Constitution."[143] But the growing number of recent decisions that are rooted in state constitutional law may provide more state judicial guidance in the future. Even though the decisions of one state court do

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[141] Giudicessi, *Independent State Grounds for Freedom of Speech and of the Press: Article 1 Section 7 of the Iowa Constitution*, 38 Drake L. Rev. 9, at 14-15 (1988-1989).

[142] *See, e.g.*, State v. Siel, 122 N.H. 254; 444 A. 2d 499 (1982); O'Neill v. Oakgrove Construction, Inc., 71 N.Y.2d 521; 523 N.E.2d 277 (1988) (Courts in New Hampshire and New York have recognized state constitutional reporter's privilege in protection of sources).

[143] Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 19 Stan. L. Rev. 197 (1977).

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not bind the courts of another state, rulings such as *Immuno* can help convince other courts of the "advisability of a progressive decision."[144]

In this age of rising mass media power and influence, expanding the boundaries of press freedom will not rank high on some state court agendas. However, the nationalization of the federal Bill of Rights has necessitated a "complete redefinition of the states' role in the bill of rights field" if state constitutional provisions are to remain meaningful.[145] The Supreme Court in the Rehnquist era may read the federal Constitution narrowly, and states that merely mimic federal interpretations of constitutionally protected liberties are risking a reduction of these freedoms.

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[144] Project Report, *supra* note 65, at 317.
[145] *Id.* at 284.

THE CNN/NORIEGA TAPES CASE AND PRIOR RESTRAINT DOCTRINE: AN OMINOUS SHIFT?

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THE CNN/NORIEGA TAPES CASE AND PRIOR RESTRAINT DOCTRINE: AN OMINOUS SHIFT?

> "Free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[1]

I. INTRODUCTION

Prior restraints on the news media, the Supreme Court has said, are antithetical to the First Amendment and must be presumed to be unconstitutional. In *Near v. Minnesota*, the 1931 case that has served as a beacon for modern prior restraint doctrine, Chief Justice Charles Evans Hughes reasoned that in determining constitutional protection afforded the press "it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraint upon publications."[2]

The forceful prohibition against prior restraints on the news media that has evolved from *Near* and its progeny is not absolute; at times, media rights must be balanced with other basic rights, such as a criminal defendant's right to a fair trial. In *Nebraska Press Ass'n v. Stuart*, the Supreme Court established a test for balancing the strong presumption against prior restraints with fair-trial considerations. It said that publicity must be intense and pervasive and its damaging effect on a trial more than speculative; that a court imposing a prior restraint must make a finding supported by a record showing that measures short of a prior restraint on the media would not effectively protect the right in question; and that the court must establish a prior restraint would, in fact, be effective.[3]

A recent opinion by the 11th Circuit of the U.S. Court of Appeals, however, suggests that as the nation celebrates the 200th anniversary of the Bill of Rights, informed jurists and scholars still can reach opposite conclusions when attempting to balance competing interests in a particular prior restraint case. The 11th Circuit upheld a federal district court's temporary restraining order that the Cable News Network not broadcast audio tapes it had obtained of conversations between deposed Panamanian leader Manuel Noriega and his lawyers.[4] Noriega was in custody on drug-related charges after surrendering to United States authorities during the highly publicized and controversial military invasion of Panama. The tapes, CNN said, were made by personnel at the South Florida detention facility at which Noriega was being held.

The district court issued the temporary restraining order at the request of Noriega's attorneys.[5] The court barred broadcast of the tapes, for as long as 10 days, until it could determine whether the tapes might interfere with Noriega's attorney-client privilege and his right to a fair trial. CNN refused to relinquish the tapes for inspection by the court on First Amendment grounds. The U.S. Supreme Court refused to review the case.[6]

This paper will look briefly at the history and development of the prior restraint doctrine, at the leading cases that establish the procedures for balancing the First Amendment with competing values, and how these procedures square with the Noriega opinions. The paper will argue that the courts failed to properly apply the Nebraska Press test in the Noriega tapes case, and consequently reached a result inconsistent with precedent. And it will suggest the Supreme Court, by not interceding, let stand a ruling that significantly alters the balance in free press/fair trial confrontations.

The paper will look only at whether the appellate courts should have lifted the ban on CNN's broadcast of the tapes based on established prior restraint doctrine, and not at the peripheral issue of CNN's disobedience of the court order to yield the tapes and not broadcast them.[7]

II. AN UNFETTERED PRESS AT "THE COURT OF HISTORY"

A free and vigorous press was the catalyst in the chemistry of the American Revolution. So instrumental was the press in the foundation of the new democracy that the Founding Fathers were moved to give prominence to assurances of an unfettered press in the First Amendment to the Constitution. While the existence of a separate and distinct "freedom of the press," independent of an individual's freedom to write and publish, continues to be debated even today, James Madison's original draft of the First Amendment afforded little ambiguity. Said Madison:

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments: and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[8]

The seeds of this aversion to government interference were sown in 17th century England, with its detested Licensing Act of 1662. The act, which one 20th century commentator described as "unwieldy . . . and even ridiculous," withered on the vine and was allowed to expire in 1694.[9]

In the next 100 years, as the 18th century jurist and legal writer William Blackstone observed, Englishmen assumed freedom from pre-publication interference to be a fundamental right. Said Blackstone:

"The liberty of the press is indeed essential to the nature of a free state; but this consists of laying no previous restraints upon publication, and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. . .[10]

Colonial America, which developed in tandem with English society even as the colonies drew away England, nurtured the notion of a strong and vigorous press, and the press grew strong. Not long after the American Revolution and ratification of the Constitution, the young nation faced the first major test of its authority in the Whiskey Rebellion of 1794. Although the union took up arms to quell the uprising, Congress refused to censure the democratic societies that the Federalists, the party in power, blamed for fomenting the unrest.

In 1786, Thomas Jefferson, writing from Paris, took exception to press attacks on John Jay. While lamenting the newspapers' reprehensible actions, the future president also acknowledged their indispensability.

> "In truth it is afflicting that a man who has passed his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. . ."[11]

Yet in 1798, seven years after the adoption of the Bill of Rights, the Federalist-dominated Congress passed the Alien and Sedition Acts to restrain criticism of the Federalists by the Republicans. The Federalists considered the radical ideas of the opposition, in the aftermath of the French Revolution, a threat to the young nation and were intent on suppressing them. They stopped short of gagging the press, but the numerous prosecutions for seditious libel took their toll.[12]

The Republicans, led by Jefferson and James Madison, vigorously opposed the acts as unconstitutional. In 1798, the year the acts became law, the General Assembly of Virginia resolved that it:

> ". . . doth particularly protest against the palpable and

alarming infractions of the Constitution, in the two late cases of the Alien and Sedition Acts passed at the last session of Congress [which] . . . exercise . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto -- a power which, more than any other, ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communications of the people thereon, which has ever been deemed the only effectual guardian of every other right."[13]

Madison distinguished the new American government from the "altogether different" British system, in which the people were subjects of the Crown.[14] During an earlier debate in the House of Representatives, Madison echoed the sentiments of 17th century libertarian philosopher John Milton that truth would prevail if the press were uncensored and ideas and opinions were allowed to compete freely. Said Madison in his oft-quoted assessment of democracy:

"If we advert to the nature of Republican government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."[15]

In 1800, the Republicans, led by Jefferson, turned out the Federalists. The Alien and Sedition Acts were not renewed and expired by their own terms in 1801, never having been tested in the Supreme Court. President Jefferson promptly pardoned those convicted under the acts and their fines were later returned.[16]

At the state level, prosecutions for seditious libel steadily declined throughout the 19th century. The Fourteenth Amendment, which gave the federal courts authority to review state laws, was ratified in 1868. Federal courts, however, were slow to invoke the Bill of Rights to strike down state laws. In 1925, in Gitlow v. New York, the U.S. Supreme Court first applied the First Amendment to a state law, selectively incorporating it into the Fourteenth.[17]

Finally, in the landmark New York Times v. Sullivan case, the Supreme Court said the long-dormant Sedition Act of 1798 was unconstitutional.[18] Writing for the court, Justice William Brennan concluded: "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."[19]

What is important from this analysis is that throughout the nation's formative years there was an antipathy toward attempts to regulate the press by prior restraint. Government generally assumed that post-publication sanctions were the proper and effective means of stemming press excesses.

III. MODERN PRIOR RESTRAINT DOCTRINE AS "FUNCTIONAL CONCEPT"

The Supreme Court's first encounter with a prior restraint on a news medium was Near v. Minnesota ex rel. Olson, a case decided not long after the court had brought the First Amendment within the ambit of the Fourteenth.[20] In Near, the court invoked the First Amendment's press clause to strike down a Minnesota law that allowed for a permanent injunction against newspapers or periodicals proved to be "malicious, scandalous and defamatory."[21]

A county attorney, the subject of diatribes by an anti-Semitic Minnesota weekly newspaper devoted to exposing wrongdoings of alleged Jewish gangsters and corrupt public officials, brought action against the publication under a Minnesota nuisance statute. Based on the statute, a court placed a perpetual injunction against the newspaper as a public nuisance. The injunction was upheld by the Minnesota Supreme Court. The newspaper appealed, arguing the statute was invalid on its face. The case reached the U.S. Supreme Court on this basis.

In a 5-4 decision, the Supreme Court struck down the statute as an invalid prior restraint that "put the publisher under an effective censorship."[22] Alluding to Blackstone, Chief Justice Charles Evans Hughes reasoned that:

> "In determining the extent of the constitutional protection [of liberty of the press] it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints on publication."[23]
>
> " . . . The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."[24]

Justice Hughes stopped short of holding that prior restraints on the news media could never be tolerated. In dicta, the chief justice opined that potential disclosure that posed a clear and present danger to national security might be enjoined in extreme cases -- such as publication of schedules of troop ships during a time of war.[25]

Legal scholar Vincent Blasi, writing in the Minnesota Law Review on the 50th anniversary of Near in 1981, maintained that even after half a century the case remained the Supreme Court's most important opinion on the subject of prior restraint. Said Blasi:

> "The decision would be a landmark had it accomplished nothing more than to import into modern First Amendment doctrine the 18th century aversion to licensing. But Near has had a broader impact. Chief Justice Hughes' forceful essay on the evils of prior restraint, combined with the Court's action invalidating an injunction, has had the effect of turning prior restraint into a functional rather than merely a technical or historical concept."[26]

Indeed, the judicial reasoning of Near with is emphatic rejection of prior restraints on the media pervades cases involving attempts to limit First Amendment speech and action by licensing and injunctions. That Near has emerged as the leading precedent for the prior restraint doctrine is without question. Its "historic rejection of licensing and the prestige of the Near decision are important symbols in contemporary thinking about the First Amendment," Blasi concluded.[27]

The reasoning of Near can be followed in numerous cases brimming with judicial eloquence decrying virtually all attempts at imposing prior restraints on the news media. Perhaps the most dramatic of these -- for its sensational nature in a charged social and political climate and for the speed with which the Supreme Court responded -- was New York Times Co. v. United States[28] -- popularly known as the Pentagon Papers Case.

The case arose when the Nixon administration's Justice Department went to court seeking an injunction to prevent The New York Times, and later the Washington Post, from publishing a 47-volume classified study documenting the history of U.S. involvement in the Vietnam conflict. The material had been illegally taken by Daniel Ellsberg, one of several authors of the study, who had grown disillusioned with the war. Ellsberg passed the purloined papers to The New York Times, which had begun publication of its contents when the Nixon administration went to court.

The government argued that the papers had been stolen and publication posed an imminent danger to national security. The U.S. Court of Appeals for the Second Circuit enjoined The Times from printing the papers;[29] a similar request for an injunction against the Washington Post in the District of Columbia was rejected.[30] The Supreme Court intervened, freezing publication and beginning an immediate review of the injunction.[31]

In a terse per curium opinion only four days after hearing oral arguments, the court rejected the notion that publication of the study posed an imminent danger to national security and voted 6-3 to dissolve the injunctions. The court simply noted that any system of prior restraint carries "a heavy presumption against constitutional validity" and that the government had not overcome that burden.[32]

Ultimately, the case spawned six concurring and three dissenting opinions, all of which either tacitly or explicitly accepted the rationale of Near that prior restraints on the media were presumptively unconstitutional.[33] In a concurring opinion, Justices Potter Stewart and Byron White focused on the court's strong disdain for prior restraints under the First Amendment. Stewart, writing for himself and White, noted the "concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system."[34] Among other things, the opinions echoed Near, emphasizing the extremely narrow range of instances in which a prior restraint on constitutionally protected speech might pass muster.

The Pentagon Papers case is of particular interest because it is indicative of a class of prior restraint cases -- those triggered by the issuance of an injunction. In numerous cases resulting from the issuance of injunctions, the court has made clear that prior restraints hold special disfavor in the courts and should be used only, as Chief Justice Burger held in Nebraska Press Ass'n v. Stuart, as "most extraordinary remedies."[35]

Nebraska Press involved a conflict between the news media's right to publish information about an ongoing sensational murder case -- including the defendant's confession -- and the defendant's Sixth Amendment right to a fair trial. The case began in 1975 with the murder of six members of a family in a small Nebraska community. A neighbor was arrested for the crime and confessed to police.

The trial court judge barred publication of all information from pretrial hearings in the case and ordered the press to follow voluntary Nebraska Bar-Press Guidelines that, among other things, counseled against publishing confessions and statements or evidence that might endanger a defendant's ability to receive a fair trial. The Nebraska Supreme Court generally upheld the lower court's order, and the Nebraska Press Association appealed to the U.S. Supreme Court.[36]

The Supreme Court unanimously agreed that the Nebraska court's restrictions on reporting about the investigations and hearings in the case violated the First Amendment. Chief Justice Warren Burger, writing for himself and four other justices, said that a prior restraint on the publication of news was "one of the most extraordinary remedies known to our jurisprudence."[37] But the chief justice stopped short of saying that a prior restraint on reporting news would never be tolerated in a free press/fair trial conflict. To resolve the conflict, he invoked Judge Learned Hand's variation of the clear-and-present danger test. The test said the "gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger."[38]

Based on this rationale, Chief Justice Burger established three criteria for balancing interests in a trial situation. First, the court must determine whether the coverage is intense and pervasive. The court then must decide, based on findings, whether the publicity will affect the defendant's ability to receive a fair trial. Second, the court must determine, based on a record of specific findings, whether measures short of a prior restraint on the media would protect the accused's Sixth Amendment rights. Finally, it must be established that a prior restraint on the media would, in fact, ensure the right it is designed to protect.

Applying these rules, Chief Justice Burger agreed with the trial judge that prejudicial publicity was strong and pervasive, but found that evidence of clear and present danger to the defendant's right to a fair trial was at best only speculative. He also concluded that the trial judge had failed to explore ways of ensuring a fair trial that were less destructive of the First Amendment, such as ordering trial participants not to talk to the press or changing the location of the trial. Finally, the chief justice said there was no evidence that the prior restraint would have achieved its aim of limiting prejudicial pretrial publicity because it failed to restrain other sources of the same information within the community.[39]

Chief Justice Burger noted that the order at issue, like the order in the Pentagon Papers case, did not prohibit -- but only postponed -- publication. He observed that the media often impose their own delays to verify information; but, he said, "such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter."[40] Expounding on the notion of government-imposed delays, he cautioned:

"We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government in insinuate itself into the editorial rooms of the Nation's press."[41]

The chief justice further noted that, as a practical matter with respect to delays imposed on media publication, the element of timeliness was critical if "press coverage is to fulfill its traditional function of bringing news to the public promptly."[42]

Justice William Brennan, writing a concurring opinion for himself and Justices Stewart and Marshall, went a step further than the majority opinion. While acknowledging the "right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights," Justice Brennan concluded that prior restraints on the media in an attempt to ensure that right were always constitutionally impermissible.

". . . judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the accused without necessitating so drastic an incursion on the equally fundamental and salutary constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors."[43]

IV. CNN AND THE NORIEGA TAPES

A. Facts

On November 6, 1990, representatives of Cable News Network played an audio tape for Frank Rubino, the Miami-based attorney for deposed Panamanian leader Manuel Noriega. The tape, which Rubino identified as an audio recording of telephone conversations between Noriega and staff members at Rubino's office, was one of a number of such tapes CNN had acquired from an unidentified source. The network contended the tapes suggested the federal government had unlawfully intercepted the telephone conversations. Officials at the prison where Noriega was held frequently monitored and recorded inmate telephone conversations, unless the inmate requested that conversations with attorneys be private.[44]

On November 7, Noriega's lawyers filed a motion in the United States District Court for the Southern District of Florida seeking to enjoin CNN from broadcasting contents of the tapes. They argued that dissemination of the contents of the tapes was a violation of attorney-client privilege and would hamper Noriega's Sixth Amendment right to a fair trial by disclosing to the prosecution elements of Noriega's trial strategy, as well as other confidences.

B. The District Court

District Judge William Hoeveler granted an injunction against broadcast of the tapes in an order dated November 8.[45] Hoeveler noted that the attorney-client privilege does not typically rise to constitutional dimensions. In this case, however, the judge concluded, the privilege took on a constitutional aspect because "it serves to protect a criminal defendant's Sixth Amendment right to effective assistance of counsel by ensuring unimpeded communication and disclosure by the defendant to his attorney."[46] Because Noriega's communication with his attorneys was already impeded by his knowledge of the existence of the tapes, however, any restraint based on this aspect of the privilege would be merely "symbolic and prophylactic," Hoeveler wrote.[47]

The attorney-client privilege also implicated Noriega's Sixth Amendment right to a fair trial, according to Hoeveler. Because one purpose of the privilege is to prevent disclosure of information that might damage a criminal defendant's case, the judge said the real issue before the court was not the privilege per se, but the right to a fair trial. As a result, Hoeveler wrote, he viewed the case as a direct confrontation between the First Amendment prohibition against prior restraint and Noriega's right to a fair trial under the Sixth Amendment.

Hoeveler concluded that despite the "heavy burden" required to justify a prior restraint, cases involving a criminal defendant's fair-trial right were "[a]mong the very narrow range of cases which might justify a restraint."[48] The judge cited the three-prong test used by the U.S. Supreme Court in the *Nebraska Press* case.[49]

Although the *Nebraska Press* test was fashioned to guide courts in cases involving prejudicial pretrial publicity, Hoeveler concluded that the standard also applied to Noriega's attempt to keep his trial strategy private. The real danger posed by the tapes was that the tactics of Noriega's defense team would be known to the prosecution. The problem, the judge wrote, was that before he could apply the *Nebraska Press* test, he would have to review the tapes. Because CNN had resisted turning the tapes over to the court for review by a magistrate, Hoeveler concluded that a temporary injunction against airing the tapes would remain in effect until CNN made the tapes available.

"It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court -- that is, to allow CNN to argue that no prior restraint should be issued because no clear and immediate harm is apparent when the only reason that no clear and immediate harm yet appears is because CNN has so far prevented this court from reviewing the contents of the tapes in its possession."[50]

Hoeveler rejected CNN's argument that if the court wanted the tapes, it should obtain them from the government. First, the judge wrote, sifting through "potentially hundreds" of calls between the general and his attorneys for privileged communications would be an inefficient use of the magistrate's time. Second, CNN's tapes might not have been made by the government at all. The tapes "might have been recorded from a location outside of the prison where Noriega is incarcerated."[51]

Hoeveler's Supplemental Order took on an almost apologetic tone as the judge emphasized that the restraint did not constitute a decision on the merits of Noriega's claim. Noting the Nebraska Press holding that even a temporary restraint required a showing of immediate harm, Hoeveler nonetheless concluded that "the unique nature of the problem" required that broadcast of the tapes be halted until the court could review the tapes and decide whether a permanent injunction should be issued.[52]

C. The Court of Appeals

On November 10, the United States Court of Appeals for the 11th Circuit denied CNN's request that it overturn Hoeveler's temporary restraining order.[53] Partially because temporary restraining orders are normally not appealable, the three-judge panel decided it would view CNN's "emergency appeal" not as a direct appeal of the district court's decision, but as "a petition for a writ of mandamus against the District Court to correct an abuse of discretion."[54] In other words, the 11th Circuit would examine the record to determine whether Hoeveler abused his judicial power by entering the restraining order.

The 11th Circuit began its discussion by noting that trial judges have broad discretion to take steps to ensure that Sixth Amendment rights of criminal defendants are protected. That discretion, the court of appeals wrote, includes steps that might negatively affect First Amendment interests. The court left little doubt that First Amendment rights could be trumped by fair trial rights if the two directly conflicted. The court wrote: "When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nevertheless yield to the latter."[55]

Nevertheless, the court said, some showing of immediate danger to a defendant's fair trial rights is necessary before First Amendment protections can be overcome. With only one indirect reference to Nebraska Press, the 11th Circuit opinion embarked on a divergent discussion of cases involving access to court proceedings and prejudicial pretrial publicity. The 11th Circuit did not cite the three-prong test from Nebraska Press, but apparently erroneously quoted the three-prong test from Press-Enterprise Co. v. Superior Court.[56] This test, less rigorous than the test used in Nebraska Press, was designed for use in cases involving access to court proceedings, not restraint of material already possessed by the media. Nowhere in the opinion did the court seem to acknowledge the gravity of the historical presumption against prior restraint. Ignoring the district court's emphasis on the dangers of disclosing trial strategy to the prosecution, the court of appeals seemed to regard the tapes as perilous primarily because their broadcast might make it difficult to seat an unbiased jury.

In another section of the opinion, the 11th Circuit outlined steps the district court should follow -- assuming it obtained the tapes -- to determine whether the attorney-client communications between Noriega and his attorneys were indeed privileged. The court of appeals suggested Noriega may have waived the privilege by signing a release allowing prison authorities to record his telephone conversations. If so, the court wrote, the district court would have to examine the reasonableness of any expectation of privacy Noriega might assert. The 11th Circuit did not clearly state how these considerations affected the validity of a prior restraint against broadcast of the tapes. The court did say, however, that the existence of the privilege, "while not necessarily determinative of whether such communications should be publicly broadcast, would be relevant to the District Court's assessment of potential harm to Noriega's right to a fair trial."[57]

Finally, the 11th Circuit expressed no small degree of indignation that CNN came before the court asking it to lift the restraining order while still refusing to turn over the tapes for review. "While appealing to our national's judicial system for relief, CNN is at the same time defiant of that system's reasonable directions."[58] At the conclusion of its written opinion, the court of appeals asserted that no litigant could simultaneously violate a court order and seek review of that order. The latter statement seemed to cast doubt on whether the extensive discussion up to that point in the opinion was aimed at the issue ostensibly before the appellate court -- the validity of the restraining order -- or constituted mere dicta.

D. The Supreme Court

After its loss before the 11th Circuit, CNN filed an application to stay the restraining orders and a petition for a writ of certiorari with the United States Supreme Court. The court, without opinion, denied both the application and the petition on November 18.[59] Two justices dissented from the denials.

Justice Marshall, in an opinion joined by Justice O'Connor, said: "In my view, this case is of extraordinary consequence for freedom of the press." He expressed concern that the Court had left intact lower court decisions that allowed a prior restraint with no showing that the restrained material would harm Noriega's right to a fair trial or that no less restrictive means were available to prevent such harm. Citing Nebraska Press, Marshall reminded the majority of the strong presumption against prior restraints and the significant burden on a party seeking to justify such restraints. "I do not see how the prior restraint imposed in this case can be reconciled with these teachings," Marshall wrote.[60]

Ten days after the Supreme Court's denial of certiorari, Judge Hoeveler lifted the temporary restraining order. On November 28, after reviewing transcripts of the tapes, Hoeveler concluded that the tapes would not harm Noriega's right to a fair trial. The judge noted that the most sensitive of the prison phone calls had already been broadcast by CNN.[61]

V. ANALYSIS

The Noriega case, as Justice Marshall warns, represents a disturbing precedent in First Amendment jurisprudence. Armed only with highly speculative justifications, a federal court has restrained broadcast of information already in the hands of a news organization, all the while downplaying its actions as "only temporary." This restraint was approved explicitly by the 11th Circuit and implicitly by the Supreme Court. Although CNN was ultimately allowed to broadcast the tapes, the temporary restraining order, with its intervening freeze on speech, is difficult to reconcile with past judicial opinions on prior restraint doctrine.

As Judge Hoeveler pointed out, Noriega appears to be a case of first impression. That novelty may account for some of the apparent difficulty both the district court and the court of appeals encountered in applying the proper legal test to these circumstances. The district court acknowledged that Nebraska Press provided the basis for deciding the propriety of an injunction against broadcast of the tapes. Nebraska Press required that the judge find the publication would clearly impair the right to a fair trial, that no less restrictive alternatives could function to make the prior restraint unnecessary, and that a prior restraint would effectively prevent the asserted harm.[62]

Despite the heavy burden imposed by the Nebraska Press test, the district court chose to regard the test as applicable not to determine the legitimacy of the temporary restraining order, but only to future consideration of lasting injunctive relief. Yet language from Nebraska Press suggests that any prior restraint, regardless of duration, must be weighed under the three-prong test. Citing New York Times v. United States,[63] the case in which the federal government sought to restrain publication of the Pentagon Papers, the Nebraska Press Court stated:

"The Court's conclusion in New York Times suggests that the burden on the Government is not reduced by the temporary nature of a restraint; in that case the Government asked for a temporary restraint solely to permit it to study and assess the impact on national security of the lengthy documents at issue."[64]

Thus, under existing Supreme Court precedent, the heavy burden applied to those seeking to restrain publication is not lessened when the restraint sought is only temporary. Indeed, the fallacy underlying the decision in Noriega is that short-term injunctive relief can operate to maintain the status quo while a court assesses the impact of a more lasting restraint. This fallacy was brought into sharp relief in a 1986 First Circuit decision, In re Providence Journal.[65] In that case, the court explained the effect of temporary restraints on the news media:

"It must be said, it is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion. News is a constantly changing and dynamic quantity. Today's news will often be tomorrow's history."[66]

Had the district court applied the *Nebraska Press* test to the facts in *Noriega*, it seems almost inescapable that Noriega's lawyers had not made a sufficient showing to justify the restraint. Under the first prong of *Nebraska Press*, the restrained publication must cause some concrete harm to the criminal defendant's fair trial rights. The district court emphasized that the harm flowing from broadcast of the tapes might be knowledge by the prosecution of Noriega's defense strategy. The 11th Circuit, on the other hand, focused on the seemingly much more remote prospect that broadcast of the tapes would make it difficult to seat an impartial jury for Noriega.

Looking first at the district court's concern about keeping defense strategy from the prosecution, the very existence of the tapes strongly suggests they were created by the government and that their contents were already available to the prosecution. Assuming this to be the case, no prior restraint on CNN could prevent the prosecution from learning the information on the tapes. Thus, if the prosecution knew what the tapes contained through the government's copies, the requested restraint fails both the first and third prongs of *Nebraska Press*. The first prong requires that the published material would impair the right to a fair trial. If the fair trial right being protected was Noriega's right to keep his attorney-client conversations from prosecutors, and the prosecutors already had access to those conversations, a CNN broadcast of the tapes posed no additional harm. The third prong requires that the restraint be effective;

if prosecutors knew the contents of the tapes, no action by the court could remedy this.

If, on the other hand, the prosecutors were unaware of the contents of the tapes, the court could have effectively prevented the harm by ordering the prosecution not to listen to news accounts of the contents of the tapes and by ordering the government to turn over the tapes to the court for review.[67] Under these facts, the requested restraint fails the second prong of the test because a means less restrictive to the media was available to prevent the harm. Thus, regardless of the prosecution's knowledge of the tapes, a prior restraint on CNN was not the appropriate vehicle to protect Noriega's confidences.

In his later order lifting the stay, Judge Hoeveler indicated that he had "instructed the prosecutors on November 21 to begin sequestration of the entire prosecution team," in addition to earlier orders that prosecutors avoid any CNN broadcasts of the tapes.[68] The judge seemed to acknowledge that ordering prosecutors to avoid broadcasts would have been a less restrictive and equally effective means of preventing Noriega's confidences from reaching the prosecution team. Hoeveler argued that such sequestration could not have taken the place of the restraining order against CNN *only* because of the time needed to establish sequestration. This argument ignores the simple expedient of imposing immediate sequestration where possible and replacing members of the team tainted by exposure to the tapes. The judge's underlying assumption seems to be that the effects of a CNN broadcast would be both immediate and all-pervasive, a questionable assumption at best. CNN might well have been willing to delay broadcast of the tapes long enough to allow the sequestration order to reach prosecutors.

While the district court's concern about the secrecy of trial strategy appears reasonable at first glance, the 11th Circuit's focus on difficulties the tapes might create in seating an impartial jury seems altogether too speculative to pass muster under the Nebraska Press test. As Justice Brennan noted in his concurrence in Nebraska Press, a judge's determination of the effect of information on potential jurors is based on supposition concerning the method of presentation, the scope of exposure, and the impact on potential jurors of the information sought to be restrained. Brennan wrote:

> "These considerations would render speculative the prospective impact on a fair trial of reporting even an alleged confession or other information 'strongly implicative' of the accused. Moreover, we can take judicial notice of the fact that given the prevalence of plea bargaining, few criminal cases proceed to trial, and the judge would thus have to predict what the likelihood was that a jury would even have to be impaneled."[69]

At a stage in the Noriega proceedings when a jury trial was months, if not years, in the future -- if indeed one ever occurs -- a prior restraint based on potential prejudicial publicity is highly speculative at best. Many less restrictive approaches than prior restraint of publication were discussed by the Supreme Court in Nebraska Press, including change of venue, postponement of trial, close questioning of jurors, and sequestration.

The rule that seems to emerge from the two lower court decisions in *Noriega* is that while lasting injunctive relief can be obtained only by the burdensome showing required by *Nebraska Press*, a temporary restraining order can be issued based on a high degree of speculation. Indeed, the district court seemed to resolve matters of disputed fact summarily *against* CNN in considering the merits of the restraining order.[70] For example, the district court rejected CNN's argument that the court should obtain copies of the tapes from the government rather than CNN, partially on the highly improbable basis that someone other than the government may have recorded the tapes. Based on the strong presumption against prior restraints, it would seem that disputed factual questions should be viewed in a light favorable to the party against whom the restraint is sought.

Although there is danger in reading too much into the Supreme Court's denial of certiorari, the strength and tone of Marshall's dissent suggests that a majority of the Court found Hoeveler's decision consistent with settled First Amendment law. If so, there may be reason to think that the *Nebraska Press* standard is open to revision. The Court may be prepared to accept a distinction between temporary restraining orders and permanent injunctive relief in prior restraint cases. Such a rule could only be seen as a major setback for First Amendment freedoms of the news media, whose very existence depends on timely news reporting.

VI. CONCLUSION

Prior restraint doctrine is one area of First Amendment jurisprudence in which the U.S. Supreme Court has seemed willing to approach absolutism. The Near v. Minnesota and Pentagon Papers cases made clear that the Supreme Court views prior restraints on the publication of news as impermissible in all but the most extreme of circumstances, such as imminent threats to national security in times of war. Yet the recent lower court decisions in Noriega, which the Supreme Court refused to review, cast doubt on this seemingly settled area of law.

Both the district court and the 11th Circuit expressed indignation that CNN sought to avoid a prior restraint while refusing to turn over the tapes. The crucial point is that the district court had the opportunity to obtain the tapes from the party to whom the Sixth Amendment duty applies -- the government. Yet for reasons of administrative convenience, and on the unlikely chance that CNN's tapes were not recorded by the government, the district court chose not to seek the tapes from the government. Assuming that the burden of sorting through all of the Noriega tapes were beyond the ability of the court, the judge could have asked CNN for only the dates of the tapes in question, thus imposing a less restrictive First Amendment burden on the network.

Nebraska Press clearly seems to require findings that the material sought to be restrained meets the three-prong test. No such findings were made in this case, even though the temporary restraining order had an effect indistinguishable from any other prior restraint. The lower courts' focus on CNN's refusal to turn over the tapes seems to have obscured the courts' view of the burdens of justifying a prior restraint, which lay with the Noriega's lawyers and not with CNN. In fact, the district court's circular reasoning -- that it must impose a prior restraint in order to determine whether a prior restraint is necessary -- stops the inquiry at the point at which it should have begun under Nebraska Press. Even without physical possession of the tapes, the court had enough information to determine whether Noriega had begun to meet his burden in seeking a prior restraint.

Burger's opinion in Nebraska Press also reasserted a central principle in prior restraint doctrine: that even a request for a temporary restraining order must meet the rigorous Nebraska Press test. The clear message is that no restraint on news, however temporary, may be allowed before the restraint meets the Nebraska Press burden. Burger emphasized that the temporary nature of the prior restraint in the Pentagon Papers case in no way lessened the burden on the party seeking the prior restraint.

In the Noriega case, Judge Hoeveler's actions once CNN turned over the tapes underscores the damage done to a news organization even when the prior restraint is only temporary. After receiving the tapes, the judge took 10 days to assess them and determine there was nothing in the tapes to support the request for the restraint. This reflects the various Noriega courts' lack of understanding, or disregard for, the lessons of Nebraska Press, and more emphatically in Providence Journal, about the exigencies of news gathering. The courts' notion that a temporary restraining order merely maintains the status quo when dealing with the reporting of news also reflects little or no understanding of the role of the news media in modern society. News is a perishable commodity and any restraint -- even of the shortest duration -- can render news useless in the discourse about current events. As Judge John Minor Wisdom noted in Providence Journal, "Today's news will often be tomorrow's history."[71]

Noriega also illustrates how the rule adopted by the 11th Circuit -- that a news medium subjected to a request for a temporary restraining order must relinquish information in its possession so a court can determine whether the news medium should use the information -- in itself deprives the news medium of its exclusive use of newsworthy information. After the 11th Circuit upheld the lower court's action and the U.S. Supreme Court had refused to intervene, several competing news organizations took legal action to obtain the contents of the tapes CNN gave to the court. Since the contents of the tapes, upon review by the court, had become court records, they were effectively out of CNN's control and fair game to competitors.

The Noriega courts' actions also effectively shift the burden, established in Nebraska Press, away from the party seeking the prior restraint to the news medium fighting it. In this case, the courts commanded CNN to relinquish -- possibly permanently -- the First Amendment right to publish timely news about potential government misconduct based solely on speculation that publication might interfere with a future trial. Under this rule, a party to a trial arguably could seek a prior restraint on any colorable basis and demand that the news medium show its hand in order to prove why it should not be subject to prior restraint. This is exactly the problem envisioned in Nebraska Press. Once a medium is commanded not to publish and then ordered into court to prove why it should not be restrained, the First Amendment is defeated. News media should be brought before the court for a prior restraint hearing only after the party seeking the restraint has met its substantial burden, at which time the media could argue against the evidence. Only after such a hearing should a restraint even be entertained.

Never has the U.S. Supreme Court upheld a lasting prior restraint on the publication of news. In the Court's leading cases it has emphasized the rare instances in which interference in the editorial discretion of news media might be upheld. Even though Chief Justice Burger cracked the door to fair-trial considerations, a prior restraint on news already in possession of the news media has never survived constitutional challenge. Courts have responded to fair-trial concerns by means other than restraints on information already in the media's possession.

This suggests that Justice Brennan's position in his Nebraska Press concurrence was probably correct: prior restraints to ensure a fair trial should never meet the rigorous standards of Near and the Pentagon Papers cases.[72] Too many tools are available to trial judges to ensure defendants' Sixth Amendment rights without damaging First Amendment principles, he reasoned, for parties seeking restraints on news media to ever meet the burden. Subsequent unsuccessful attempts to impose restraints on the reporting of trials seem to bear him out.

The 11th Circuit's Noriega ruling provides ample evidence the Supreme Court needs to clarify Nebraska Press; otherwise, the 11th Circuit's implicit acceptance of the notion that a temporary restraining order can be justified to determine whether a prior restraint is justified -- without meeting the burden of Nebraska Press -- dramatically alters a key area of prior restraint doctrine.

Justice Marshall's strong dissent to the Supreme Court's denial of certiorari also is reason for concern about the future of prior restraint doctrine in the free press/fair trail context. While denial of certiorari is considered a neutral response with respect to the case on appeal, the alarm expressed in the dissenting opinion -- by parties privy to the debate surrounding that denial -- suggests a majority of the Court might be willing to give judges a freer rein in balancing First Amendment principles with fair trial concerns.

FOOTNOTES

1. Bridges v. California, 314 U.S. 252, 280 (1941).

2. Near v. Minnesota ex. rel. Olson, 283 U.S. 718 (1931). See also, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books v. Sullivan, 372 U.S. 58 (1963).

3. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). See generally Symposium, Nebraska Press Ass'n v. Stuart, 29 Stan. L. Rev. 383 (1977); Zavatsky, Rights in Collision: Deciding Cases in the Free Press-Fair Trial Debate, 49 U. Cin. L. Rev. 440 (1980) (The author suggests that Nebraska Press was the "first Supreme Court case to apply the prior restraint precedent to a restrictive order entered to protect a defendant's right to an impartial jury."); Trager and Stonecipher, Gag Orders: An Unresolved Dilemma, 55 Journalism Quarterly 231 (Summer 1978); Note, John Z. DeLorean v. The Media: The Right to a Fair Trial Without a Prior Restraint Upon the Media, 15 Golden Gate U. L. Rev. 81 (1985).

4. United States v. Noriega, 917 F.2d 1543 (11th Cir. 1990)

5. U.S. v. Noriega, No. 88-0079-CR (S.D. Fla. Nov. 9, 1990)

6. Cable News Network, Inc. v. Noriega, 111 S.Ct. 451. (1990)

7. See Near v. Minnesota at 715. Justice Hughes notes that the "conceded Authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions." The scope of this authority is limited in several subsequent cases. See Bridges v. California, note 1 supra; Pennekamp v. Florida, 328 U.S. 331 (1946); and Craig v. Harney, 331 U.S. 367 (1947). But courts have rejected collateral challenges to contempt citations on constitutional issues when judicial orders are disobeyed, even when the original order is later deemed by a higher court to be unconstitutional. See Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972). Contrast with In re Providence Journal, 820 F.2d 1342 (1st Cir. 1986) Modified on rehearing by 820 F.2d 1354 (1st Cir. 1987) For an overview of the conflict between these two opinions, see Splichal, "When Judicial Authority and the First Amendment Collide: A Publisher's Dilemma," ___ University of Florida The Journal of Law and Public Policy ___ Spring 1991. See also Hasiotis, Constitutional Law -- Transparently Invalid Orders Exception to the Collateral Bar Rule Under the First Amendment in the Federal Courts, 21 Suffolk U. L. Rev. 265 (1987)

8. 1 Annals of Cong. 451 (1789). See also Anderson, "Origins of the Press Clause," 30 U.C.L.A. L. Rev. 456 (1983)

9. Emerson, "The Doctrine of Prior Restraint," 20 Law & Contemp. Problems 648 (1955).

10. 4 Blackstone, Commentaries on the Laws of England 151-52 (Gifford 1820).

11. 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954) cited in Nebraska Press Ass'n v. Stuart at 548.

12. Middleton and Chamberlin, The Law of Public Communication 112-113 (1991). See also Smith, Freedom's Fetters at 426, 431 (1956).

13. 4 Elliots Debates 553-554 cited in New York Times v. Sullivan, 376 U.S. 254, 274 (1964).

14. Elliots Debates at 569-570.

15. 4 Annals of Cong. 934 (1794).

16. 4 Jefferson's Works (Washington Ed.) 555. See also Levy, Jefferson on Civil Liberties: The Darker Side (1963). Levy argues that while Jefferson spoke persuasively against restraints on the press, it was not above punishing troublesome editors.

17. Gitlow v. New York, 268 U.S. 652 (1925). Justice Hughes underscored this six years later in Near v. Minnesota, when he said that it is "no longer open to any doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by the state. Near v. Minnesota at 707. See also Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

18. New York Times v. Sullivan at 274.

19. Id. at 276.

20. Near v. Minnesota at 707.

21. Id. at 703.

22. Id. at 709-712.

23. Id. at 713.

24. Id. at 720.

25. Id. at 716.

26. Blasi, "Toward a Theory of Prior Restraint: The Central Linkage," 66 *Minn. L. Rev.* 11 (1981).

27. Blasi at 14.

28. *New York Times Co. v. United States*, 403 U.S. 713 (1971). See also Godofsky and Rogatnick, Prior Restraints: The Pentagon Papers Case Revisited, 18 Cum. L. Rev. 527 (1988).

29. *U.S. v. New York Times Co.*, 328 F.Supp. 324 (S.D.N.Y. (1971).

30. *U.S. v. Washington Post Co.*, 446 F.2d 1327 (D.C. Cir. 1971).

31. *New York Times Co. v. U.S.*, 403 U.S. 713 (1971).

32. *Id*.

33. *Nebraska Press Ass'n v. Stuart*, quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting).

34. *New York Times Co. v. United States* at 730-731 (1971) (White, J. and Stewart, J., concurring).

35. *Nebraska Press Ass'n v. Stuart* at 539, 559.

36. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1027 (1975).

37. *Nebraska Press Ass'n v. Stuart* at 539, 559.

38. *Nebraska Press Ass'n v. Stuart* at 562, quoting *United States v. Dennis*, 183 F.2d 201, 212 (CA2 1950). See also Schmidt, *Nebraska Press Association*: An Expansion of Freedom and Contraction of Theory, 29 Stan. L. Rev. 431 (1977) (The author suggests the weak 'clear and present danger' formulation of Learned Hand is inappropriate in prior restraint cases).

39. *Id* at 565-567.

40. *Id*. at 560.

41. *Id*. at 560, 561, quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

42. *Id*. at 561. See also *Elrod v. Burns*, 427 U.S. 347 (1976).

43. *Id*. at 572-573.

44. *U.S. v. Noriega*, No. 88-0079-CR (S.D. Fla. Dec. 6, 1990) (available 1990 U.S. Dist. LEXIS 16688 AT 3-4).

45. *U.S. v. Noriega*, 18 Media L. Rep. 1348 (S.D. Fla. 1990).

46. Id. at 1349.

47. Id.

48. Id.

49. Id.

50. Id. at 1351.

51. Id. at N. 1.

52. Id. at 1351.

53. In re Cable News Network Inc., 917 F.2d 1543, 18 Media L. Rep. 1352 (11th Cir. 1990).

54. Id. at 1546, 18 Media L. Rep. at 1353.

55. Id. at 1548, 18 Media L. Rep. at 1355, quoting In re Application of Dow Jones & Co., 842 F.2d 603 (2d Cir.), cert. denied, 488 U.S. 946 (1988).

56. 478 U.S. 1 (1986). The 11th Circuit opinion also seemed to misstate the holding in Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981). Belo denied a broadcaster access to FBI audio tapes in the possession of a court, while the 11th Circuit seemed to cite Belo for the proposition that broadcasters could be forbidden to air tapes in their possession in the interest of preserving fair-trial rights.

57. 917 F.2d at 1551, 18 Media L. Rep. at 1358.

58. Id.

59. Cable News Network v. Noriega, 111 S.Ct. 451 (1990).

60. Id.

61. U.S. v. Noriega, No. 88-0079-CR (S.D. Fla. Dec. 6, 1990) (available 1990 U.S. Dist. LEXIS 16688).

62. Nebraska Press Ass'n v. Stuart at 562-568.

63. New York Times Co. v. U.S. at 713.

64. Nebraska Press Ass'n v. Stuart at 559.

65. In re Providence Journal, 820 F.2d 1342 (1st Cir. 1986) modified, 820 F.2d 1354 (1st Cir. 1987) (en banc), cert. dismissed, 485 U.S. 693 (1988).

66. In re Providence Journal at 1351. See also, A. Bickel, The Morality of Consent 61 (1975) (Bickel argues that "prior restraints on speech fall with a brutality and a finality of their own. Even if they are ultimately lifted, the cause irremedial loss -- a loss in the immediacy, the impact, of speech.").

67. A restraint on CNN without an injunction directed against the prosecution would seem to merely encourage prosecutors to seek out the confidential conversations by other means, such as reviewing the government tapes. On the other hand, preventing everyone from hearing the tapes in order to ensure that prosecution or 12 potential jurors aren't exposed to prejudicial information runs contrary to First Amendment principles. See Linde, Courts and Censorship, 66 Minn. L. Rev. 171, 189 (1981).

68. U.S. v. Noriega No. 88-0079-CR (S.D. Fla. Dec. 6, 1990) (available 1990 U.S. Dist. LEXIS 16688).

69. Nebraska Press Ass'n v. Stuart at 600.

70. In other situations in which facts are disputed, courts frequently view disputed facts in a light most favorable to the party against whom the motion is directed. See, e.g., F.R.C.P. 56.

71. In re Providence Journal at 1351.

72. See L. Tribe, American Constitutional Law 623-31 (1978) ("If our system of justice is functioning properly, government is prohibited from trying an accused in a prejudicial atmosphere; if pre-trial publicity prevents the impaneling of an impartial jury, the defendant is entitled by the sixth amendment to a dismissal of the charges against him. The key conflict is therefore not between a defendant's sixth amendment rights and a publisher's first amendment rights: the interests advanced to justify suppression are largely the state's interests -- in putting guilty criminals in jail and in maintaining fairness of the judicial system." Id. at 625-26 n. 15) (citations omitted).

COMPUTER TECHNOLOGY V. LAWS ON ACCESS

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Information on computer tapes is almost infinitely malleable. Searches for information can be done with little expenditure of time. Francis Bacon's phrase, "Knowledge is power," is inverted: "Power is knowledge." Computer power yields knowledge — and it does so with an ease and speed that is revolutionary.

It is hard for law to keep up with technology. In part this difficulty reflects the difficulty of answering the ethical questions that technology raises. Law should reflect society's ethics, but this is hard to achieve in the area of computerized information. The right to know versus the right to privacy is a much tougher game when it is being played on a magnetic field.

Question: Does the ease with which one can manipulate information on computer tapes make that information different than information which is only available on paper? Does the form of the information, in effect, transform the information so that different rules should apply?

Part of our legal tradition is a mistrust of information when it is synthesized: It is too easy to use and should be restricted, some courts think.

Here is an example from Michigan — *Kestenbaum v. Michigan State University*.[1] Kestenbaum wanted a copy of the computer tape that MSU used to produce its student directory. MSU said no, and the Supreme Court of Michigan upheld the university's decision. MSU had already released the information in a printed directory. The court assumed that the information was a public record, but the court held that the university was "justified" in denying Kestenbaum's request under the exemption for "information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."[2]

Here is the court's language that is most pertinent:

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[1] 414 Mich. 510, 327 N.W. 783 (1982).

[2] *Id*. at 3, 5 (Lexis legal database pagination).

> [T]he same reasoning which supports the university's decision to publish the directory cannot be extrapolated to compel release of the computer tape, even though it contains identical information.
>
> It is not seriously debated that the pervasiveness of computer technology has resulted in an ever-increasing erosion of personal privacy. There is available a larger storehouse of information about each of us than ever before. Computer information is readily accessible and easily manipulated. Data available on a single tape can be combined with data on other tapes in such a way as to create new, more comprehensive banks of information.
>
> ...
>
> Form, not just content, affects the nature of information. Seemingly benign data in an intrusive form takes on quite different characteristics than if it were merely printed.[3]

The United States Supreme Court is not necessarily a friend to computerized information, either. In 1989, in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,[4] the Court unanimously ruled that FBI rap sheets, which are computerized, cannot be given out because to do so would "constitute an unwarranted invasion of personal privacy." The Court said, "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the county and a computerized summary located in a single clearing house of information."[5]

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[3] *Id.* at 9-10. Unfortunately for us, historically judges often have been suspicious of information that is too readily available--even if the information is a matter of public record. For instance, in 1979 a monthly magazine in Madison, Wisconsin, *The Progressive*, was set to publish an article entitled, "The H-Bomb Secret: How We Got It, Why We're Telling it." See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

The government got a temporary injunction against publication of the article. The article merely synthesized information that was available in public documents. But the government argued that even though the material was in the public domain, "national security" permitted barring its publication because "when drawn together," the information presents "immediate, direct and irreparable harm to the interests of the United States."

The judge said that "the danger lies in the exposition of certain concepts never heretofore disclosed in conjunction with one another." In short, he thought that "synthesizing" public information changed its nature--from benign to dangerous. He granted the temporary injunction, but before he could issue a permanent injunction, a Madison newspaper published a letter containing a diagram of the H-bomb and a list of its components. The government dropped its case against *The Progressive* and pressed no charges against the newspaper.

[4] 109 S. Ct. 1468 (1989).

The Court pointed out that the central purpose of the Freedom of Information Act was to shed light on the performance of government agencies — not on individuals. And it pointed out that while a lot of information on rap sheets is available as public documents, some of it is not.[6]

The Court could have ordered redaction — ordered that the FBI only give out the information that is available in public documents and exclude the innuendos, or whatever, that appear on rap sheets. But the court prohibited the whole thing — public information and all.

So if one wants a profile on a person's criminal history, one will simply have to find out every place that the person has lived and then go to all the courthouses in those jurisdictions and look at the court records.

In 1990, a Connecticut court held that an agency with computerized records only needs to provide a computer printout.[7] Connecticut has a statute which says, "Any public agency which maintains its records in a computer storage system shall provide a printout of any data properly identified."[8] The Connecticut court read that language narrowly.

As these three cases demonstrate, courts are not always going to be sympathetic to reporters who want computerized data on tapes or other media. The answer lies in laws that give access to computer tapes. Legislators need to be persuaded of the importance of mandating that persons wanting public records on computer tapes will receive computer tapes.

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[5] *Id.* at 9-10 (Lexis legal database pagination). For differing views on this case, see Harry A. Hammitt, "High court alchemy: The Supreme Court turns public information private," *The Quill* (October 1989), pp. 28-30, 32; and William Swislow, "Access is good, but so is privacy," *The Quill* (October 1989), p. 31.

[6] *Id.* at 3-4, 15.

[7] *Chapin v. Freedom of Information Commission*, 22 Conn. App. 316, 577 A.2d 300 (1990).

[8] Connecticut General Statutes @1-19(a). On June 3, 1991, Connecticut's Senate passed legislation already passed by its House which would permit the requester to receive government information stored in computers in the form the requester wanted, including on disk or computer tape. Peter Viles, "Connecticut Legislature cuts the *Red* Tape," *Uplink: The Forum for Computer-Assisted Reporting* (June 1991), pp. 1, 3.

States keep changing their laws — sometimes for the better, sometimes for the worse.[9] The

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[9] All it takes is one bad incident for information to be restricted. The murder of 21-year-old actress Rebecca Schaeffer, costar of the television series "My Sister Sam," is a case in point. She died in Los Angeles on July 18, 1989, when she answered a knock at her apartment door and a deranged admirer, 19-year-old Robert Bardo, shot her in the chest.

Bardo, who lived in Tucson, Arizona, had paid $250 to a Tucson private investigating firm to get Schaeffer's address. The firm got her address from driver's license records in California--public records available at the time to anyone virtually on demand. The requestor did have to fill out a form that asked the reason for the request, but only addresses of judges and peace officers were automatically restricted by law. (Robert Welkos, "Public Records Led Suspect to Actress-Victim," *Los Angeles Times*, July 22, 1989, Home Edition, p. 1, col. 3.)

A furor followed Schaeffer's death.

The *Los Angeles Times* quoted California legislator Mike Roos as saying, "Tragically, government records have become the personal research archives of thieves, kooks and killers. The fact is we are all sitting ducks for any criminal or kook who wants to track us down." (Jerry Gillam, "Senate Panel Favors Curbs on Public Use of DMV DATA," *Los Angeles Times*, Home Edition, August 30, 1989, p. 3, col. 5. The first line of Roos' statement is also quoted by M.L. Stein, "Access to drivers' records limited: California governor issues order to Department of Motor Vehicles despite objections by media organizations," *Editor & Publisher* (September 23, 1989), p. 28.)

"Kooks and killers," and most sane persons, for that matter, can no longer use California driver's license records to learn residential addresses. On October 1, 1989, California's governor approved legislation sponsored by Roos. The law says, in part:

> In order for individuals to be able to exercise their right to privacy, they must be able to choose when to release personal information, and to whom, and reasonable laws requiring the individual to surrender control should be enacted *only when it is deemed absolutely necessary for society's welfare*. [Emphasis added.]
>
> The personal privacy and security of one's home is fundamental to this right of privacy. (California ALS 1213, § 1 (1989).)

Now California law says that residential addresses maintained by Department of Motor Vehicle records are "confidential and shall not be disclosed to any person," with basically four exceptions: (1) a court; (2) a law enforcement agency; (3) a financial institution licensed by California or the federal government to do business in California and which has a written waiver signed by the person whose address the institution requests; and (4) an insurance company with a California license which is seeking the address of a motorist involved in an accident with someone insured by the company. (*Id.*, § 6.)

Note that journalists have no right to gain residential addresses through California's Department of Motor Vehicles. Anyone who smuggles the information to a journalist (or any other unauthorized person) faces a fine of up to $5,000, imprisonment in a county jail for up to a year, or both. (*Id.*, § 7.)

Unfortunately, the California law is placing a roadblock in the path of a journalist, say, who would like to do a story on school bus safety. If the journalist can get traffic violation records through the Department of Motor Vehicles but has no residential

Justice Department is currently working on setting rules for gaining computerized information under the Freedom of Information Act.[10]

Besides fighting the fear that information on tapes is too dangerous to allow, we also have to fight the privatization of public information. The Securities and Exchange Commission is a notorious example of this. Bechtel Information Services now keeps records of S.E.C. filings. The S.E.C.'s EDGAR program can be expensive. EDGAR stands for "Electronic Data Gathering & Retrieval."[11] Because of budget constraints, the S.E.C. could not develop a staff that could process the deluge of information, so the S.E.C. hired a private firm to do so. Disclosure, Inc., a Bethesda, Maryland, firm, held the contract from 1968 to 1985, but lost it to Bechtel.[12] If a newspaper wants to keep up on S.E.C. filings, here is what it costs: $10 just to get a call from Bechtel saying that a document has

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addresses, the journalist may well have difficulty trying to determine if the "Bob Smith" with 20 violations is the same Bob Smith in whose hands school children's lives are placed. Yet privacy is a compelling issue. Balancing privacy with the right to know is truly difficult.

[10] Mitchell Hartman, "Investigative reporters use databases to break stories," *The Quill* (November/December 1990), p. 21.

A report by a House committee said this about policy on access to public records:

> Policies regulating the electronic collection and dissemination of information by Federal agencies must necessarily reflect the existing statutory obligation of agencies to make information available to the public. New technology does not alter the requirements imposed on agencies to maintain and disclose public records. Electronic information systems must preserve public access rights without diminution and, where possible, should extend the availability and utility of government information.

Twenty-Eighth Report by the Committee on Government Operations, *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview* (99th Congress, 2d Session, House Report 99-56, April 29, 1986), p. 13.

One litigator (Kathy Meyer) has concluded, however, that "it is much tougher now than 10 years ago to get government records through the Freedom of Information Act." Tess Chichioco, "Making it hard to get records: Government agencies are using computers to hide disclosure under the Freedom of Information Act," *Editor & Publisher* (March 31, 1990), p. 16.

[11] Twenty-Eighth Report by the Committee on Government Operations, pp. 2-3.

[12] Paul McMasters, "Government information at a price," *The Quill* (October 1989), p. 17.

been filed. A copy costs extra. If one wants same-day service, one has to pay $50 per month per company — plus $10 per call and more for the document.[13]

In 1992, a phase-in of a new system should begin for the SEC. Another private organization, BDM, a division of Ford Aerospace, will be hooking up 13,000 companies to feed data directly from the company's computers to the S.E.C. Currently 150 companies are online with the SEC.[14] It is a $50 million project. Then can one get information directly from the S.E.C.? The answer is that another private broker, Mead Data Central, has a contract with the government. It is funding a "dissemination subsystem," and on-line rates will probably range from $50 to $125 an hour.[15] Compare this to the E.P.A.'s Toxic Release Inventory, which will have an on-line system directly to the government at rates of $18 to $25 per hour; Department of the Interior at $84 an hour for water resources facts; and Department of Education ERIC educational resources data at $30 an hour.[16]

By the way, a Ninth Circuit Court of Appeals case, *Long v. U.S. Internal Revenue Service*,[17] does say that the Freedom of Information Act applies to computer tapes. No one knows for sure how many computerized databases the government maintains — maybe 800 to 4,000.[18] A lot of these databases are available online through commercial information brokers. Anyone wanting to know about the 400 government databases may contact a private firm, Information USA, and get a copy of its Federal Database Finder for $125. Call 301-657-1200.[19]

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[13] *Id.*

[14] *Id.*

[15] David L. Margulius, *Uncle Sam Knows*: Is Big Business Pulling the Plug? *PC/COMPUTING* (October 1989), p. 83.

[16] *Id.* at 83, 85. The 1991 Connecticut legislation which has passed both houses would prohibit Connecticut's government from entering into exclusive, private contracts. Viles at 3.

[17] 596 F.2d 362 (1979). For some in-depth stories made possible by government databases, including federal databases, see Richard Kleeman, "Good hunting in databases," *Quill* (September 1989), p. 16.

[18] Hartman at 21.

[19] Margulius at 85.

Anyone wanting information on PC-based bulletin board systems, many of which are free, may call the Department of Commerce's Economic Bulletin Board — 202-377-3870.[20]

Companies such as Knight-Ridder and Dow Jones are buying government data on magnetic tapes, loading into mainframes and granting subscribers on-line access, at a profit of about $1.5 billion.[21] There have been many protests from people who would like inexpensive on-line access, but there is an association that represents these database companies — the Information Industry Association. It wants to protect private-sector industry.[22] The government is also concerned about protecting the private sector.[23]

But when a member of the staff of the Governor of South Dakota, Gov. George Mickelson, tried to get information from the Department of Agriculture's database, the staff member was told it was available online from the Martin Marietta Corporation, with a price tag of several hundred dollars. Mickelson exploded. The long and short of it was that Reagan's plan to prevent the government agencies from giving on-line access got shelved. Still, although theoretically the agencies can give on-line access if they wish, they basically have little incentive and little funding to do so.[24]

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[20] *Id.*

[21] *Id.* at 79.

[22] *Id.* at 80-81.

[23] For instance, the Twenty-Eighth Report by the Committee on Government Operations said:

> The distribution of government information through electronic information systems ... has a potential to allow Federal agencies to maintain a monopoly or near-monopoly over information. This potential arises because of the size, technical requirements, and expense of these systems. ...
>
> ... Concerns over monopolistic control of data are not necessarily avoided even if Agency XYZ should allow public users to search its electronic data base. Without any competition for the computerized search services, the agency would have a captive audience of users.

Report at 5-6.

[24] Margulius at 81.

The bright spot about private companies selling computer information is that at least one can get the information — if one is wealthy enough.[25]

Finances, of course, are a lot of the problem. It is not just guns versus butter, but Patriot missiles versus adequate staffing and equipment so we can have easier access to information. Apathy if not bewilderment is also a problem. The Justice Department, which is working on rules right now for obtaining computerized information under the Freedom of Information Act, surveyed 96 federal agencies. Thirteen did not respond. Of those that did, over half — 53% — did not think they had to use their computers to search for information sought under the Freedom of Information Act.[26]

Money may well remain a problem, but we do need to look at what kind of statutory language will provide us what we need.[27]

A good law for access to computerized information needs, at a minimum, the following dozen elements:

1. A definition of "public record" which is broad enough to encompass computerized records:

Here is an example of a bad statute: Alabama @ 41-13-1 says, "[T]he term 'public records' shall include all written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities, and other subdivisions of government in the transaction of public business...."

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[25] See McMasters at 17.

[26] Hartman at 21. See also "OIP Releases Results of Electronic Recores Survey," *Access Reports: Freedom of Information* (November 14, 1990), pp. 1-5.

[27] See *The Freedom of Information Committee Report to the American Society of Newspaper Editors* (April 1990) and The Reporters Committee for Freedom of the Press, *Access to Electronic Records: A Guide to Reporting on State and Local Government in the Computer Age* (August 1990). Also see David Pritchard & Neil Nemeth, "Predicting the Content of State Public Records Law," *Newspaper Research Journal* (Fall 1989), pp. 45-57.

Rhode Island @ 38-2-3(e) says, "Any public body which maintains its records in a computer storage system shall provide a printout of any data properly identified."[28] What about tapes?

A clear trend in state statutes is for the definition of what constitutes a public record to include *all* records kept by government agencies, *"regardless of physical form or characteristics,"* unless the records are exempt.

Kentucky @ 61.870 (1) also uses "regardless of physical form or characteristics" language, but goes further, making clear that computerization may not be used to impede public access to information. Kentucky law says, "[A]ny unit of state, county or municipal government, or any court, may maintain any records by computer or other rapid access data collection system, *provided that those records which are public records shall be kept in a manner which will allow the public unlimited and speedy access to them.*"

"Regardless of physical form" language is incorporated into the statutes of many other states.[29]

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[28] Connecticut @ 1-19a uses almost identical language, substituting the word "agency" for "body." But Connecticut's Senate and House passed legislation in June 1991 to allow requesters to receive disks or tapes. See *supra* note 8. New Hampshire @ 91-A:4.V provides for "printouts" of computer data, not tapes. Kansas @ 45-501(b) calls for a "printed copy." In 1991, Montana passed legislation which says that "each person is entitled to a copy of information compiled, created, or otherwise in the custody of public agencies that is in electronic format, subject to the same restrictions applicable to the information in printed form." Montana ALS 254, HB 562 (1991). Does this mean that a requester may receive disks or tapes, or only printouts?

[29] "Regardless of physical form or characteristics" is used in Colorado @ 24-72-203 (6)-(7); Delaware @ 29-502(1); Florida @ 119.202(c); Illinois @ 116-201(c); Kansas @ 45-217(f)(1); Kentucky @ 61.870(2); Louisiana @ 44:1(A)(2); Massachusetts @ 4-7; Mississippi @ 25-16-3(b); Montana @ 2-6-101 and @ 2-6-202; New Mexico @ 14-3-2; North Carolina @ 132-1; Oregon @ 192.005(5) and @ 192.420 (4); Rhode Island @ 38-1-1.1 and @ 38-2-2; South Carolina @ 30-3-20; South Dakota @ 1-27-9(2); Tennessee @ 10-7-301 (6) (for state records, but @ 10-7-403, for county records, only says "[a]ll documents, papers, records, books, and books of account"); Utah @ 63-2-61; Virginia @ 42.1-77; Washington @ 40.14.010; West Virginia @ 29B-1-2(5); Wisconsin @ 19.32(2); Wyoming @ 16-4-201(a)(v).

For variations on "regardless of physical form or characteristics" language, see Alaska @ 09.25.220 (6) ("regardless of format or physical characteristics"); Arkansas @ 25-19-103 ("data compilations in any form"); Delaware @ 29-10004 ("regardless of the physical form or characteristic"); (Hawaii @ 92F-3 ("or other physical form"); Indiana @ 5-14-3-2(7) ("regardless of form or characteristics"); Maryland @ 10-611(f)(ii) ("in any form, including ... a computerized record"); Nebraska @ 84-712.01 ("regardless of physical form"); New York @ 6-86.4 ("in any physical form whatsoever"); North Dakota @ 44-04-18.6 ("regardless of form or characteristic"); Oklahoma @ 24A.3.1 ("regardless

2. A presumption that information is open: Exceptions which are necessary for privacy must be explicitly cited and narrowly construed. Also, these exceptions should be periodically reviewed, and after passage of a specified number of years, private information should become public information. Also, special use of restricted information should be allowed for research.

Texas @ 6252-17a has a beautiful "Declaration of Policy" (Texans always do it up big):

> Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed....

Missouri @ 610.011 is a little less flowery and more straightforward:

> It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. [This law] shall be liberally construed and ... exceptions strictly construed to promote this public policy.

Florida @ 119.14 provides for periodic legislative review of exemptions — a so-called "sunset provision." Many states provide that information shall become public information after a specified number of years.[30]

Generally, as few exemptions as possible should exist, consistent with protection of bona fide privacy and security interests of human beings and protection of endangered flora, fauna, and archaeological cites. For example, Virginia @ 2.1-342 (36) has this exemption:

> Records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, if, in the opinion of the public body which has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This

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of physical form or characteristic").

[30] For instance, Georgia @ 50-18-98 and Nevada @ 378.310 limit restrictions on records of constitutional officers to 25 years. Alaska @ 18.50.310(f) restricts birth records for 100 years.

exemption shall not apply to requests from the owner of the land upon which the resource is located.

Some exemptions are harder to understand. Washington @ 42.17.317 exempts "information on commercial fertilizer distribution."

Some exemptions are more specific than they need be. For instance, Tennessee @ 10-7-504(a)(1) says, "Any records containing the source of body parts for transplantation or any information concerning persons donating body parts for transplantations shall be treated as confidential and shall not be open for inspection by members of the public." An exemption for medical records should suffice.

Computer software is a common exemption.

In Washington @ 42.48.020 you can get hold of private information — identifiable personal records — when necessary for research purposes. A "standing human research review board" will review the research proposal for "ethical and scientific soundness." The researcher must agree in writing to keep identities confidential.

3. "Redaction": Redaction is allowing restricted information to be excised from a record and the remaining information to be released instead of restricting the whole record. Statistical information is a special form of redacted information which should be specifically allowed.

Florida @ 119.07(2)(a) says: "Any person who has custody of public records and who asserts that an exemption ... applies to a particular record shall delete or excise from the record only that portion of the record for which an exemption is asserted and shall produce for inspection and examination the remainder of such record." Other states mandating redaction include: California @ 6257; Illinois @ 116-208; Indiana @ 5-14-3-6; Kansas @ 45-221 (35) (d); Louisiana @ 44:32(B) ("may" redact); Maryland @ 10-614(3)(iii); Massachusetts @ 66-10 (a); Minnesota @ 13.03(3); Mississippi @ 25-61-9 (2); Nebraska @ 84-712.06; New York @ 89(2)(a) ("may" redact); Rhode Island @ 38-2-2(22); Virginia @ 2.1-342 (A)(3) ("may" redact); Washington @ 42-17.160; and Wisconsin @ 19.36 (6). These states appear to represent a trend.

Indiana @ 5-14-3-6(a)-(b) provides for redaction on request, but this "does not apply to public records that are stored on computer tape [or] computer discs ...if the disclosable information is made available for inspection and copying in some other form." Given the ease with which redaction can be accomplished on computerized records as compared to paper records, the Indiana statute makes little sense. What if the information cannot be disclosed in some form other than computer tape or discs? "A public agency may charge a person ... the agency's direct cost of reprogramming a computer system ... to separate the disclosable information from nondisclosable information." Given the relative ease with which redaction can be accomplished by computer, the cost probably should not be that great. Why charge for redaction of computerized information and not information on paper when redaction by computer is easier?

As for statistical information, it is generally released. For instance, Idaho @ 9-338(10) says, "Nothing contained herein shall prevent a public agency from disclosing statistical information that is not descriptive of an identifiable person or persons."

4. Access to information to all citizens regardless of the purpose for which the information is sought: The government's passing on proper "purpose" is intolerable in a free society.[31] Meaningful

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[31] Should there be exceptions for commercial use? If information is public, it is public; that, of course, is a tautology. On what grounds can a capitalistic society deny access to public information for commercial use? Trying to distinguish acceptable public use from forbidden commercial use is also fraught with problems. Courts generally do not find dissemination of information in newspapers to be primarily for commercial gain. (E.g., *Advertiser Publishing Co. v. Fase*, 279 F.2d 636, 640 (9th Cir. 1960): "The primary function of a newspaper of general circulation is to convey information and ideas." But even commercial speech receives First Amendment protection (see, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). If people are concerned about telephone solicitations, Florida handles that problem with a Telephone Solicitation Act that says @ 365.165(1), "No person shall use ... an automated system for the selection or dialing of telephone numbers and the playing of a recorded message when a connection is completed to a number called." And Florida @ 501.059 permits a telephone listing that indicates that a person does not wish to receive telephone solicitations; violators can receive up to a $10,000 civil fine.)

Arizona is a state with harsh provisions concerning commercial use of public information. Its definition of "commercial purpose" is so broad that it is hard to see how a newspaper's use of the information could be considered noncommercial. Here is the Arizona statute in its entirety @ 39-121.03:

A. A person requesting copies, printouts or photographs of public records for a commercial purpose shall, upon making such a request, provide a certified statement setting forth the commercial purpose for which the copies, printouts or photographs will be used. Upon being furnished the verified statement the custodian of such records may furnish reproductions, the charge for which shall include the following:

1. A portion of the cost to the state for obtaining the original or copies of the documents, printouts or photographs.

2. A reasonable fee for the cost of time, equipment and personnel in producing such reproduction.

3. The value of the reproduction on the commercial market.

B. If the custodian of a public record determines that the commercial purpose stated in the verified statement is a misuse of public records or is an abuse of the right to receive public records, the custodian may apply to the governor requesting that the governor by executive order prohibit the furnishing of copies, printouts or photographs for such commercial purpose. The governor, upon application from a custodian of public records, shall determine whether the commercial purpose is a misuse or an abuse of the public record. If the governor determines that the public record shall not be provided for such commercial purpose he shall issue an executive order prohibiting the providing of such public records for such commercial purpose. If no order is issued within thirty days of the date of application, the custodian of public records shall provide such copies, printouts or photographs upon being paid the fee determined pursuant to subsection A of this section.

C. A person who obtains public records for a commercial purpose without indicating the commercial purpose or who obtains a public record for a noncommercial purpose and uses or knowingly allows the use of such public record for a commercial purpose or who obtains a public record for a commercial purpose and uses or knowingly allows the use of such public record for a different commercial purpose or who obtains a public record from anyone other than the custodian of such records and uses them for a commercial purpose shall in addition to other penalties be liable to the state or the political subdivision from which the public record was obtained for damages in the amount of three times the amount which would have been charged for the public record had the commercial purpose been stated plus costs and reasonable attorneys' fees or shall be liable to the state or the political subdivision for the amount of three times the actual damages if it can be shown that the public record would not have been provided had the commercial purpose of actual use been stated at the time of obtaining the records.

D. As used in this section " commercial purpose" means the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or the obtaining of names and addresses from such public records for the purpose of solicitation or the sale of such names and addresses to another for the purpose of solicitation *or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of such public record*. Commercial purpose does not mean the use of a public record as evidence or as research for evidence in an action in a judicial or quasi-judicial body of this state or a access also requires public access to terminals. The ideal situation, of course, would be interactive access, and we are heading that way. Also, instruction should be provided to persons needing it in order to ensure meaningful access.

Texas @ 6252-17b says: "Neither the custodian nor his agent who controls the use of public records shall make any inquiry of any person who applies for inspection or copying of public records beyond the purpose of establishing proper identification and the public records being requested...." Washington @ 42.17.270 says: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose of the request...." And in Wisconsin @ 19.35(i), "[N]o request ... may be refused because the person making the request is unwilling to be identified or to state the purpose of the request." Mail requests cannot be refused, either.

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political subdivision of this state. (Emphasis added.)

In 1990, Kentucky passed legislation @ 61.970 which says:

> (1) A person who requests a copy of all or any part of a database ... in any form for a commercial purpose shall provide a certified statement stating the commercial purpose for which it shall be used.
>
> (2) Such a person shall enter into a contract with the owner of the database .... The contract shall permit use of the database ... for the stated commercial purpose for a specified fee. The fee shall be based on the:
>
> (a) Cost to the public agency of time, equipment, and personnel in the production of the database ...;
>
> (b) Cost to the public agency of the creation, purchase, or other acquisition of the database...;
>
> (c) Value of the commercial purpose for which the database ... is to be used.
>
> (3) It shall be unlawful for a person to obtain a copy of all or any part of a database or a geographic information system for a:
>
> (a) Commercial purpose without stating the commercial purpose; or
>
> (b) Specified commercial purpose, and to use or to knowingly allow the use of the database ... for a different commercial purpose; or
>
> (c) Noncommercial purpose, and to use or to knowingly allow the use of the database ... for a commercial purpose. *A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the database ... for a commercial purpose as a result of its publication or broadcast unless it has given its express permission for such commercial use.* (Emphasis added.)

As for access to terminals, Alaska @ 09.25.115 says, "When offering on-line access to an electronic file or data base, a public agency also shall provide without charge on-line access to the electronic file or data base through one or more public terminals."

Florida @ 119.085(1) provides for "remote electronic access":

> As an additional means of inspecting, examining, and copying public records ..., public records custodians may provide access to the records by remote electronic means. The custodian shall charge a fee for remote electronic access, granted under a contractual arrangement with a user, which fee shall include the direct and indirect costs of providing such access. ... The custodian shall provide safeguards to protect the contents of public records from unauthorized remote electronic access or alteration and to prevent the disclosure or modification of those portions of public records which by general or special law are exempt.[32]

As for instruction, Illinois @ 116-205.5 is designed to help the computer illiterate public: "[E]ach public body shall furnish upon request a description of the manner in which public records stored by means of electronic data processing may be obtained in a form comprehensible to persons lacking knowledge of computer language or printout format."

Oregon also wants public records to be comprehensible, whether computerized or not. Oregon @ 192.310 says, "With the exception of physicians' prescriptions, all records, reports and proceedings required to be kept by law shall be in the English language or in a machine language capable of being converted to the English language by a data processing device or computer." Oregon obviously gave up on making physicians' prescriptions comprehensible.

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[32] Louisiana authorizes "direct computer access to public records in the custody of the Department of State." Louisiana ALS 278; HB 324 (1990).

Oregon @ 79.4080(4) authorizes this remote access: "The Secretary of State may furnish, upon request, computer remote access to the Uniform Commercial Code data base to any person upon payment of a fee prescribed by the Secretary of State and sufficient to pay at least the actual cost of such service."

Texas @ 405.018(a)(1), (b)(1)-(2), (d):

> The secretary of state may establish a system to provide access by electronic data transmittal processes to information that is (1) stored in state computer record banks.... The secretary of state may: (1) develop computer software to facilitate the discharge of the constitutional and statutory duties of the office; and (2) enter agreements to transfer the software on the terms and conditions specified in the agreements. ... The secretary of state shall set and charge a fee for access to information ... in an amount reasonable and necessary to cover the costs of establishing and administering the system ... The secretary of state may assess a reasonable fee for a transfer of software ....

5. Cost containment: "Actual" or "reasonable" cost is not adequate because an accountant's view would require that the cost include real estate and utilities. Cost containment requires three provisions:

A. Computer records shall cost no more than staff time and cost of duplication. A waiver, for instance, of the cost of, say, five hours of staff time per month — or even of all staff time — is highly desirable.[33]

B. Reduction or a total waiver of any costs when information is to be used for informing the public (i.e., a journalists' waiver).[34]

C. In cases where raw public information is released to a private group for compilation of statistics or any other manipulation and the results are then sold to the public for a profit, the raw information will still be available to the public from the government for the costs listed in A and B above.[35]

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[33] Minnesota @ 13.03.3. and Washington @ 42.17.300 say that no fee can be charged for inspecting public records. Michigan @ 4.1801(4).4(3). says that staff fees may be charged only for "unreasonably high costs." This language is also good: "[F]ees shall exclude the costs of *any* search for and review of the record, and shall not exceed the actual cost of reproduction and certification, unless otherwise provided by State statute." Illinois @ 116-206.6(a). But this Illinois statute also says, "Each public body may charge fees reasonably calculated to reimburse its actual cost of reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records." Charges for use of equipment could be abusive if "actual cost" of "use" included overhead.

Alaska @ 09.25.110(c) excludes from costs the first five hours per month of staff time and also says, "The personnel costs may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks." Maryland @ 10-621 (b) says, "The official custodian may not charge a fee for the first two hours that are needed to search for a public record and prepare it for inspection."

[34] It is common for states to provide for reductions or waivers in the public interest. "Shall" is better than "may"; "waive" is better than "waive or reduce." Alaska @ 09.25.110.3(d) ("may") (Alaska adds, "Fee reductions or waivers shall be uniformly applied among persons who are similarly situated.") Alaska @ 09.25.4(b) also specifically provides for this reduction or waiver ("may") in relation to "electronic services and products".) Connecticut @ 1-15 ("shall" and "waive"); Illinois @ 206.6(b) ("shall" and "waiver or reduction"), Maryland @ 10-621(3) ("may" and "waive"); Michigan @ 4.1801(4).4(1) ("may" and "waiver or reduction"); Mo. @ 610.026(1) ("may" and "waiver or reduction"; Oklahoma @ 51-24A.5 ("shall" and waiver); Texas @ 6252-17a.9(g) ("shall" and "waiver or reduction"); Wisconsin @ 19.35 (e) ("may" and "waiver or reduction").

Costs of gaining computer tapes can be unreasonably high. For instance, persons wanting voter registration lists in Arizona will pay "*two cents* for each name appearing on the register for a printed list and *ten cents* for each name for a magnetic computer tape, plus the cost of the blank computer tape if furnished by the recorder." (Arizona @ 16-168(E). Emphasis added.)

Some statutes on their face warn of high costs.

Costs in Texas might be Texas sized: "The costs of providing the record shall be in an amount that reasonably includes all costs related to providing the record, including costs of materials, labor, and *overhead*." (Texas @ 6252-17a.8(b).) "Overhead" could include helping to pay for the building and utilities.

Under California law concerning property taxation, "property characteristics information maintained by the assessor is a public record." As for cost: "The actual cost of providing the information is not limited to duplication or production costs, but may include recovery of developmental and indirect costs, such as *overhead, personnel, supply, material, office, storage, and computer costs*." (California Rev. & Tax Code @ 408.3(a),(c).)

For cost containment, language of "actual" or "reasonable" cost is not adequate because it lacks clarity. For instance, Virginia @ 2.1-342 (A)(4) uses both "reasonable" and "actual" cost language: "The public body may make reasonable charges for the copying, search time and computer time expended in the supplying of ... records; however, such charges shall not exceed the actual cost to the public body in supplying such records. ... " Do "actual" costs include "overhead"? Is "overhead" a "reasonable" charge?[36]

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[35] Idaho @ 22.2.2 and Ohio @ 22.2, for instance, say, "A public agency shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions."

[36] Tennessee @ 10-7-507 uses both "reasonable charge" and "cost."
States using "actual cost" or "cost" language include: Connecticut @ 1-15; Illinois @ 116-206.6 (a) ("actual cost for reproducing"); Iowa @ 22.3; Michigan @ 4.1801.4 (1); Minnesota @ 13.03.3; Mississippi @ 25-61-7; New Hampshire @ 91-A:4(IV); New York

These statutes are better for cost containment: Missouri @ 610.026(2) says, "Fees for providing access to public records maintained on computer ... tapes or discs ... shall include only the cost of copies and staff time required for making copies." In Washington @ 42.17.300, costs are "actual costs incident to copying." Wisconsin @ 19.35 limits fees to the "actual, necessary, and direct cost of reproduction."

6. Requester's choice of form of information (tailoring): If a requester wants information in a specific form, and if a computer system can produce information in a specific form, then the requester should receive the information in that form. For example, if a requester wants a computer tape of a limited number of fields in raw ASCII format for a specific size of tape, and if the machinery can produce the tape, then the requester should receive such a tape. Tailoring (or programming) should not be deemed to be creating a new record.

Some states permit tailoring. For instance, Alaska's statute @ 09.25.220.1 speaks of agencies doing "electronic manipulation of the data contained in public records in order to tailor the data to the person's request or to develop a product that meets the person's request." Iowa @ 48.5.2(a) is also good in this respect. Speaking, for instance, of "a list of qualified electors and other data on registration and participation in elections...," Iowa law says, "Each list shall be produced in the order

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@ 6-87 (b) (iii); Vermont @ 1-316 (b); West Virginia @ 29B-1-3 (5).

States using "reasonable" cost language include: Arizona @ 39-121.03; Colorado @ 24-72-205; Iowa @ 22.3; Kansas @ 45-219; Louisiana @ 44:32 (C); Maryland @ 10-621 (2); Massachusetts @ 66-10 (a); Minnesota @ 13.03; ; Rhode Island @ 38-2-4 ($15 per hour maximum for search charges); South Carolina @ 30-1-60; Wyoming @ 16-4-202 (a); Utah @ 63-2-66.

Some states use fixed prices for various records, e.g., Connecticut @ 1-15; Hawaii @ 92-24, Montana @ 2-6-103; New Jersey @ 47:1A-2; New Mexico 14-8-13. Massachusetts @ 66-10 (a) uses a hodge-podge—"reasonable fee," "actual expense of ... search," and a list of fees.

In New York, legislation was introduced in 1991 which would have addressed, among other things, fees for computerized information. The legislation virtually got nowhere, according to Robert J. Freeman, Executive Director of the State of New York Department of State Committee on Open Government. Freeman, telephone interview, July 19, 1991.

and form specified by the requester, so long as that order and form are within the capacity of the record maintenance system...."

Oregon's law @ 192.440(2) on tailoring says:

> If the public record is maintained in a machine readable or electronic form, the custodian shall provide copies of the public record in the form requested, if available. If the public record is not available in the form requested, it shall be made available in the form in which it is maintained.

That does not sound like it provides for tailoring, but the law does appear to provide for tailoring when it comes to costs. The requester would pay for the "actual cost" involved, "including costs for summarizing, compiling or tailoring such record, either in organization *or media*, to meet the person's request." Sometimes you have to just keep reading until you come to language you like, and cite that.

In 1991, Utah passed extensive legislation on access to information. While the legislation @ 63-2-201(5) says that "a governmental entity is not required to create a record in response to a request," the legislation continues:

> A governmental entity shall provide a record in a particular format if:
> (I) The governmental entity is able to do so without unreasonably interfering with the governmental entity's duties and responsibilities; and
> (II) The requester agrees to pay the governmental entity for additional costs if the governmental entity actually incurs additional costs in providing the record in the requested form.

Some states give custodians discretion on whether to tailor. Virginia @ 2.1-342.4 says: "Public bodies shall not be required to create or prepare a particular requested record if it does not already exist. *Public bodies may, but shall not be required to*, abstract or summarize information from official records or *convert an official record available in one form into another form at the request of the citizen*." (Emphasis added.) Rhode Island @ 38-2-3 uses language that is perhaps even less friendly to requesters: "Nothing herein shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect such public records was made."

While California law @ 6256 says, "Public records stored in a computer shall be disclosed...," it also says, "Computer data shall be provided in a form **determined by the agency**." (Emphasis added.) Such language is particularly dangerous, for depending on the interpretation of the term "form," discretion might also apply not only to format, but also to whether a requester receives a computer disk or tape at all.

Some states clearly give custodians discretion on whether to provide tapes. For instance, Indiana's law @ 5-14-3-3(c) says:

> [A] public agency may or may not, in accordance with a nondiscriminatory uniform policy of the agency, permit a person to duplicate or obtain a duplicate copy of a computer tape, computer disc, microfilm, or other similar or analogous record system that contains information owned by or entrusted to the agency.

And Pennsylvania @ 66.3 and Tennessee @ 10-7-506(a) say, "The lawful custodian of ... records shall have the right to adopt and enforce reasonable rules governing the making of ... extracts, copies, photographs, or photostats." Giving local custodians a great deal of discretion, of course, can be very undesirable for persons wanting computer tapes.

New Mexico law @ 15-1-9(c) allows requesters to get computer tapes, but it attaches strings:

> The state agency which has inserted data in a data base, with the approval of the secretary, may authorize a copy to be made of a computer tape or other medium containing a computerized data base of a public record for any person if the person agrees:
>
> (1) not to make unauthorized copies of the data base;
>
> (2) not to use the data base for any political or commercial purpose unless the purpose and use is approved in writing by the secretary and the state agency that created the data base;
>
> (3) not to use the data base for solicitation or advertisement when the data base contains the name, address or telephone number of any person unless such use is otherwise specifically authorized by law;
>
> (4) not to allow access to the data base by any other person unless the use is approved in writing by the council and the state agency that created the data base; and
>
> (5) to pay a royalty or other consideration to the state as may be agreed upon by the secretary and the state agency that created the data base.

7. Access to and retrieval of all information on computer tapes: Custodians should have an affirmative duty to ensure that all information is functionally available, including accurate record layout of tapes that list the density, blocking, and whether the type is in ASCII, EBCDIC, or COBOL.

The Florida Court of Appeals declared that "all of the information in the computer, not merely that which a particular program accesses, should be available for examination and copying in keeping with the public policy underlying the right-to-know statutes."[37] That language should be incorporated into a statute.

Tennessee @ 10-7-202(b) provides for functional availability in terms of indexing. It says that public records have to have an index; computer indexes are allowed if there is a hardcopy backup.

8. Time limits for production of records by custodians after a request: Specific time limits are needed to guard against sluggish custodians. Connecticut @ 1-15 says production shall be done "promptly." Rhode Island @ 38-2-4(c) and Ohio @ 149.43 (B) call for copies of records to be produced "within a reasonable time." Washington @ 42.17.290 calls for agency regulations that "provide for the fullest assistance to inquirers and the most timely possible action." Wyoming @ 16-4-202 also lacks specific times.

As for specific times, a couple of southern states demand the greatest speed. Arkansas @ 25-19-105 (B) allows 24 hours for a custodian to determine if "personnel or evaluation records" are exempt, 24-hour "written notice via overnight mail to the subject of the records at his [or her] last known address," and three days for the Attorney General to issue an opinion on whether those records should be released if asked by the "custodian, requester, or the subject." In Mississippi @ 25-16-5(2), agencies which do not adopt contrary regulations must produce records within 1 day (14 days is the maximum for contrary regulations). At the other extreme, Maryland @ 10-614 allows 30 days.[38]

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[37] *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. Ct. App. 1982).

[38] Other time periods for production or records include: Kentucky @ 61.872(4), 3 days; Louisiana @ 44:32, 3 days; Missouri @ 610.023.2, 3 days; Maine @ 409, 5 days; Michigan @ 4.1801(5), 5 days (10-day extension under "unusual circumstances"); New Hampshire @ 91-A:4.IV, 5 days (or "written acknowledgment" and "a statement of the time reasonably necessary to determine whether the request shall be granted or denied"); New York @ 89.3, 5 days; Virginia @ 2.1-342(A)(1),(4), 5 days (7-day extension if "practically impossible" in 5); West Virginia @ 29B-1-3(4), 5 days; Wisconsin @ 19.35(4), 5 days; Illinois @ 116-203(c), 7 days (7-day extension for specific reasons); Massachusetts @ 66-10(b), 10 days; California @ 6256, 6256.1, 10 days (10-day extension); Texas @ 6252-17a.4A(a), 10 days (10-day extension); Rhode Island @ 38-2-7, 10 days (30-day extension).

9. Guidance and technical help for custodians of records: A state board or agency to help both state and local officials is necessary to provide custodians access to expertise in maintenance and access of computer records. The board or agency should also have the duty of keeping abreast of developments in computer storage and retrieval.

Having such a board or agency is a clear trend.

For example, in 1989 California law @ 11700 established an "Office of Information Technology." It is certainly forward looking: "The Legislature finds that information technology is an indispensable tool of modern government for the rapid and efficient handling of data, records, communication, and transactions, and for assisting decision makers in carrying out their tasks and responsibilities at all levels of government." The purpose of the Office of Information Technology is "to identify new applications for information technology, to improve productivity and service to clients and to assist agencies in designing and implementing the use of information technology."

South Dakota @ 1-2-11 has a state board "which will apply efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of state records."

The Texas State Library and Archives Commission is given a great deal of power over local governments. Before local governments can electronically store "any local government record data of permanent value," they must secure "an electronic storage authorization request." This is apparently Texas' attempt to ensure that a state body with expertise will oversee local attempts at computerization.[39]

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[39] Texas @ 205.007, 441.151.4. See also, e.g., the following statutes and sequels: Connecticut @ 1-21j(a) ("Freedom of Information Commission"); Florida @ 13-1.005 ("Division of Electronic Data Processing"); Kentucky @ 16.945 ("Information Systems Commission"); Nebraska @ 81-1116.02 ("Central Data Processing Division"); and Virginia @ 2.1-343.1 ("Department of Information Technology").

10. Instructions to custodians on proper maintenance and storage of records: The state board or agency should promulgate and enforce appropriate regulations, for example, on correct facilities and temperatures to protect our legacy of information.

Florida administrative records are very specific on how to preserve, for instance, microfiche records — down to the material from which protective coverings are made and the temperature and humidity during storage. Such detail should be reserved for regulations, which can be more easily changed than statutes.[40]

Washington's lawmakers @ 40.10.020 are among those interested in protecting records from disasters: "In order to provide for the continuity and preservation of civil government, each ... officer of the state shall designate those public documents which are essential records ... and needed in an emergency and for the reestablishment of normal operations after any such emergency." After designating records as essential, the governmental officers must then protect them "by vaulting, planned or natural dispersal of copies, or any other method approved by the state archivist."

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[40] The Florida Administrative code goes into great depth on storage of records. For example, 1B-26.0021 says:

> 1. Microfilm stored in roll form shall be wound on cores or on reels of a type specified by American National Standards Institute (ANSI) standard PH5.6, Standard for dimension for 100-foot Reels for Processed 61 mm and 35mm Microfilm. The materials used for the cores and reels shall be non-corroding such as plastic compounds or non-ferrous metals. Steel reels shall be used only if the reels are well protected by lacquer, enamel, tinning or other corrosion-resistant finish. Plastics and lacquer that might give off reactive fumes or exudations during storage shall not be used. If plastic materials are used, they shall be free of peroxides. 2. Paper strips which have not been deacidified or rubber bands shall not be used for confining film on reels or cores. No materials are to be used that shall ignite, decompose, or develop reactive fumes or vapors.

Besides saying, "The microfilm is to be kept in a fire resistant vault or room," the code also says:

> The relative humidity and temperature of the storage vault or room shall be maintained at a constant level. Optimum levels are 70 degrees F. for temperature and 40 to 50 percent for humidity. Rapid cycling and wide ranges of humidity or temperature shall be avoided and shall in no instance exceed plus or minus 5 percent humidity or plus or minus 5 degrees F. temperature in a 24-hour period.

This kind of detail is acceptable for regulations, but unacceptable for statutes; statutes also lack the flexibility of codes for updating as technology progresses.

Minnesota @ 138.7.8 explicitly mentions "nuclear" as well as "natural" disasters as reasons for its program to preserve essential records.

11. Instructions on destruction of records: Paper records cannot be kept forever; on the other hand, premature destruction of paper records without appropriate microfiche, optical, magnetic, or computer backup could result in irretrievably lost information.

Arthur Howe won a Pulitzer Prize for National Reporting for his series in *The Philadelphia Inquirer* which began with the story, "Computer wipes out 10,000 tax records then duns for nonpayment."[41] If the I.R.S. can wipe out records, we should have some concern about local custodians doing the same. On the other hand, paper can always be misplaced or damaged, and it is terribly space consuming.

The issue of the form in which information will be available well may become moot in an increasing number of states. Paper simply takes too much room to store. Already, in some jurisdictions, records will only be available on computer because only computer records will be kept.

Alabama @ 40-2-12 is one state expressing faith in computer technology by allowing destruction of at least some original paper records if the records are stored on microphotographic film or in a computer system. Its law, for instance, allows the Department of Revenue to store data on "electronic media and computer output microfilm and, after validation of accuracy, to destroy the original documents." Iowa @ 144.36.1, 144.37 allows destruction of original court records (with court approval) and marriage and dissolution books if the information is stored in computers. Nevada @ 239.051.1 allows destruction of virtually any originals if records are on microphotographic film or if the information has been entered into a computer system.

Also showing faith in computerized records is South Dakota @ 6-1-11, which says:

> Whenever the creation, maintenance or storage of any public record is specified by state law for political subdivisions, such record may be in the form of punched cards, magnetic tapes, disks and other machine-sensible data media within a data processing

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[41] The story appeared January 30, 1985. Copies of Mr. Howe's series are reprinted in the Knight-Ridder publication, *The 1986 Pulitzer Prize Winners.*

> system. Such records shall be backed up by a duplicate, be accessible to viewing members of the public, and be retained in accordance with all applicable requirements for the retention of manual records. To the extent an office is computerized, the office need not keep a hard, paper copy....

Other states, such as Arizona @ 11-479, are still in transition and require that backup paper be kept.[42]

12. Sanctions on custodians for failure to follow the statutes on access to information: Sanctions can be either criminal or civil in nature. They create the necessary "teeth" in the law. Any requester who has to resort to a suit should be reimbursed for all legal costs and reasonable attorney fees.

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[42] In an interesting twist, Tennessee @ 10-7-202 (b) allows use of a computer, but not hardcopy, in this instance: Tennessee requires that public records have an index. A computer index is acceptable, but "a security copy" must be made and two hardcopies must be made at least weekly, and one of the hardcopies has to be stored somewhere other than in the register's office. "The use of the computer hardcopy printout by the public may be banned or restricted by each register," Tennessee law says, "so long as computer or word processors are available and operable for viewing the information contained in the restricted printouts."

Many states use criminal sanctions.[43] Others use civil fines.[44] Awarding attorney fees and court costs is quite common.[45] Of course, before any sanctions can occur, appropriate court procedure must be followed.

Satisfying these twelve elements should contribute to providing access to public information stored in computers.

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[43] Those states include: Arkansas, 25-19-104, $200, 30 days, or both; Florida @ 119.02, "misdemeanor in the first degree"; Iowa @ 22.6, a "simple misdemeanor," and @ 22.10.3(c) impeachment if two prior violations; Louisiana @ 44:37, $100-$1000 and 1 to 6 months for a first conviction, or both, and then $250-$2,000 and 2 to 6 months, or both; Nebraska @ 84-712.09, class III misdemeanor, subject to impeachment; Nevada @ 239.010, a misdemeanor; New Mexico @ 239.010.2, a misdemeanor; North Dakota @ 44-04-18, "punishable as an infraction"; Oklahoma @ 24A.17, $500 or 1 year in jail, or both; South Carolina @ 30-1-140, $50 per month of refusal; Vermont @ 1-314 (a), $500; West Virginian @ 29B-1-6, $100-$500, up to 10 days in jail; and Wyoming @ 16-4-205, $100.

[44] As for fines, Florida @ 119.10 says not over $500. Kentucky @ 61.882 (5) and Washington @ 42.17.340 provide for payment to the complainant of "$25 for each day that he [or she] was denied the right to inspect or copy said public record"; Louisiana @ 44:35 (e) (1), $100 per day, on top of actual damages; Mississippi @ 25-61-15, $100 plus "reasonable expenses"; Missouri @ 610.027.3, $300; Rhode Island @ 38-2-9 (d), not exceeding $1000 for "willful violation"; and Virginia @ 2.1-346.1, $25 to $1,000 to be paid to the State Literary Fund.

[45] New York @ 6-89 (c) only allows attorney fees and litigation costs if "(i) the record involved was, in fact, of clearly significant interest to the general public; and (ii) the agency lacked a reasonable basis in law for withholding the record." But the requirement of "clearly significant interest to the general public" seems vague and unfair to individuals who may have a significant personal interest in finding out information not of general interest. New Jersey @ 47:1A-4 limits the recovery of attorney fees to $500.

Many other states permit recovery of attorney fees: Arkansas @ 25-19-107; Arizona @ 39-121.02; Florida @ 119.12(1),(2) for winning at trial level and for winning an appeal brought by an agency; Hawaii @ 92F-15 (d); Illinois @ 116-211 (h) for substantially prevailing; Indiana @ 5-14-3-9 (h); Iowa @ 22.10.3(c) for plaintiffs "successfully establishing a violation"; Kansas @ 45-222 (c) for winning plaintiffs, and @ 45-222 (d) for winning defendants if the action was "not in good faith"; Kentucky @ 61.882(5); Louisiana @ 44:35 (E) (2) Maryland @ 10-623(f); Michigan @ 4.1801 (10); Nebraska @ 84-712.07; New Hampshire @ 91-A:8; ; Oregon @ 192.490 (3); Tennessee @ 10-7-505(g) for willful refusal; Vermont @ 319(d) (reasonable fees and costs); Wisconsin @ 19.37(2); and Washington @ 42.17.340(3).

As computer technology moves forward at a gallop, it is important that laws not lag too far behind. To hope that the law will keep pace with technological development is perhaps futile. But if we as a society are fully to realize the fruits of technological advancement in the area of access to public information,[46] then progressive laws must be our hope. We must look at our laws in light of technology, and we must press for necessary changes in those laws. Otherwise we face the frustration of having knowledge, but not power.

In short, Francis Bacon's equation — knowledge is power — only works for computer technology if laws give computers and their operators freedom to work. The freedom must not be absolute, for legitimate privacy interests do exist. But legislators must take seriously their duty to open up government as much as possible within the rightful limits of privacy protection. Too often computer technology and laws on access are out of harmony. The two should work together to enhance our open society.

In the words of Walt Whitman, "I think heroic deeds were all conceiv'd in the open air...."[47]

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[47] *Leaves of Grass.*

UNIVERSITY OF MISSOURI
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LEGAL RAMIFICATIONS OF ELECTRONIC IMAGING IN NEWSPAPERS

A RESEARCH PAPER FOR

COMMUNICATIONS LAW J/304

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Preface

Photographs don't lie – it's a cliche´ on which photojournalism has built a reputation. Time and again one sees the statement made by expert after expert as he or she reads about the history of photography.

Much of the reason for the firm belief in pictures as an accurate depiction of history has come about because photography is based on a scientific process involving a chemical reaction between light and light-sensitive materials. Unlike verbal reportage, which can be biased by the men and women who write and edit the stories, photography has maintained a reputation of truthfulness.

But that reputation is becoming tarnished. The main reason for the change in the latter part of the 1980s and now in 1990 is the oncoming era of electronic technology in photography. Through the use of computers and high-powered softwares, pictures can now be altered with the speed, precision and ease never before available to photographers. In the past 10 years, Americans have seen the Great Pyramids moved, and Oprah Winfrey's head put on Ann Margret's body in pictures through the use of electronic imaging.

While some may argue that these are examples of the new technology gone wild, the free use of today's electronics is vehemently defended by those who employ it to their advantage.

Photographic historians are quick to point out, however, that manipulation has been going on for a long time -- perhaps since photography began in 1839. Civil War photographers moved bodies in their pictures to make them suit their purposes. W. Eugene Smith, a man revered for his work as a photojournalist, was a consummate printer and combined images in the darkroom to achieve the effects he desired. And the list goes on. The point is, manipulation is not new to photography. Although some people argue that the new technology will bring a change in the ethics of photojournalism, the truth is that electronic imaging is forcing journalists to take a fresh look at some age old problems.

One of the main areas of concern as photography enters this new electronic era is law and how it pertains to digital imaging. Because changes can be made so quickly and accurately with computers, journalists will have to take a special look at how the technology may effect photography.

This paper is not meant to interpret all there is to know about the law and how it applies to the use of electronic imaging in newspaper photography. Rather, it is intended to show some of the areas of concern for those who will be working with the new technology. It is important to keep in mind that laws vary by jurisdiction so few rules can be given that will cover all situations.

Introduction

Much of what happens to a photograph that is published by a newspaper is beyond the photographer's control. For newspaper photographers, once the image is made and the picture is in the hands of an editor, little can be done by the individual to protect him or herself from the artistic and/or legal abuse that might occur.

Take for example, Robert Doisneau, a French photographer who enjoys shooting street scenes in Paris.[1] Doisneau took a picture of a young woman seated next to a middle-aged man in a small cafe in Paris. The photographer asked for and was granted permission by both subjects to use the picture which he in turn released to his agency for distribution.[2]

Some time later the photograph appeared in a magazine produced by the temperance league in an article illustrating the evils of alcohol. The subject of the photograph, a drawing instructor, was not pleased. The picture then appeared in another magazine with a story concerning prostitution in the Champs-Elysees. This time the drawing instructor had had enough and sued not only the magazine but the photographer and his agency. The court fined the magazine a large sum of money for fraud along with the agency (which incidently had not officially released the picture), but the photographer was acquitted. The court ruled that Doisneau was, "an 'innocent artist.'"[3]

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[1] Gisele Fruend, Photography and Society, Boston: David R. Godine, 1980, p. 178.

[2] Ibid. p. 178.

The subject of the photograph in this incident was obviously portrayed in a false light, and as a result of this defamation he had legal recourse through which to allege damages. While one can argue that the photographer was in fact an "innocent artist," perhaps the next jurisdiction would not see things quite so clearly and fine the photographer as well.

Another case of circumstances beyond the photographer's control came about in 1989 at the St. Louis Post-Dispatch.[4] It was a simple problem. A Diet Coke can was left on the table when a picture of Pulitzer Prize-winning photographer Ron Olshwanger was taken during a party celebrating his receiving the award. A simple crop of the photograph would have removed the can from the scene. Instead the editors "scitexed;" i.e. electronically removed the unwanted can using a machine whose brand name has become a synonym for the electronic alteration of pictures.

While on the surface it appears that no harm has been done. During their wait for the celebration, Mr. Olshwanger had mentioned that he did not drink alcohol and he hoped there would be a "Diet Coke" at the party in addition to the champagne that is traditionally on hand for victory celebrations.[5] By removing the can, an interesting twist to the story had suddenly been removed through the use of electronics. And while this deletion of a portion of reality was probably not actionable in court, it is an ironic twist to a story involving one of journalisms highest awards.

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[3] Ibid. p. 178.

[4] Staci Kramer, "The case of the missing Coke Can," *Editor and Publisher*, 29 April 1989, pp. 18-19.

[5] Ibid. p. 19.

"'The thing that I find frustrating about this is (that) I've been an advocate around the country for not doing what I did,'" Robert C. Holt III, directory of technology at the Post-Dispatch told writer Elizabeth Rogers of News Photographer magazine.[6]

The purpose of these two anecdotes is to illustrate a major point -- it is extremely easy for a situation to get out of control once either a picture or film has left the photojournalist's hands. Photographers need to be aware of the potential legal dangers that are inherent in their business especially as computers that can alter images begin to play a regular role in the day-to-day production of news photographs. What was once an innocent feature shot may be the grounds for a defamation suit when the computer has been used to alter its contents. This paper will cover some of the main topic areas associated with electronic imaging: false light invasion of privacy, libel, emotional distress and copyright restrictions.

False Light

Perhaps the area that should be of the greatest concern to photographers in dealing with electronic imaging is false light invasion of privacy. False light is so close to libel that frequently people sue for both invasion of privacy and defamation.[7] In fact, many jurisdictions do not make a distinction for false light invasion of privacy outside of their defamation statutes. It bears repeating at this point, photographers should be aware that each jurisdiction handles libel and invasion of privacy matters according to its own rules and regulations.

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[6] Elizabeth Rogers, "Now you see it, now you don't; Coke can's disapearance spotlights potential for editing abuse," *News Photographer*, August 1989, p. 16.

[7] Harold Nelson and Dwight L. Teeter Jr. and Don R. Le Duc, Law of Mass Communications, Westbury, N.Y.: The Foundation Press, Inc., 1989, p. 287.

False light invasion of privacy involves the portraying of someone in a situation -- either better or worse -- other than what actually transpired. People can be portrayed as being heroic when they actually aren't, or as criminals when that as well is not true. One of the incidents cited quite often is the case of Ralph the Diving Pig.[8]

> It seemed like such an innocent image; one of Ralph the Diving Pig leaping into a pool of water so that he could swim to his trainer and drink milk from a baby bottle. But when the image was published in a magazine that specialized in sexually explicit material, Ralph's trainer was mad. Indeed, she was so angry that she filed suit against the magazine arguing that the photograph had libeled her and invaded her privacy. When the case was finally settled, the trainer received $65,000.[9]

In this era of big-dollar law suits, an award like this may seem minor, but it illustrates the point that the most innocent of situations can result in legal action being taken. This is of particular interest to those journalists who will be deciding what items will or will not be removed from a photograph.

If an item was removed or added to a photograph resulting in an image that portrays the individual in a false light, who knows what can be done to protect the newspaper involved from litigation. Something as innocent as the removal of a Diet Coke can may end up with the newspaper in court with a false light invasion of privacy suit on its hands.

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[8] Michael Sherer, "Libel Via News Photography: More Than Innocent Images," No Pictures Please: It's the Law, A National Press Photographers Association National Report, Durham, N.C., 1987, p. 28. Also, Braun v. Flynt, 726 F.2d 245,247 (5th Cir.1984) cert. denied, 105 S.Ct. 252 (1984), and Nelson, pp. 286-287.
[9] Ibid. p. 28.

Or to take this a step further, suppose a person was added to a photograph. The new electronics make it very easy for people to be moved within a photograph or two pictures merged. Publications have already used the electronics technology to create composite pictures. Dustin Hoffman and Tom Cruise, the two actors who starred in the popular movie Rain Man, were photographed in two separate locations and then the pictures were combined electronically for use in the January 16, 1989 edition of Newsweek.[10] One of the stars was photographed in Hawaii and the other in New York. This technique upset Fred Ritchin, author of In Our Own Image: The Coming Revolution in Photography, and the former director of photography at the New York Times magazine.[11]

> . . . I felt not only misled but extraordinarily shaken, as if while intently observing the world it had somehow still managed to significantly change without my noticing. But most unsettling for me was the point of view of the magazine's picture editor cited in the (Wall Street) Journal article. In giving a rationale for such modification, Karen Mullarkey asserted that while it is taboo at Newsweek to retouch news photos, because it would 'undermine your reputation' it is permitted for feature or fashion pictures.[12]

While Newsweek has a mulit-million dollar budget, it certainly does not mean that electronic alterations are the exclusive brainchild of those publications with large amounts of money to spend on high-powered computer systems. Within the next two years the Associated Press will be offering their new electronic darkroom system to its nearly 1,000 member newspapers in the United States.[13] As a result, newspapers will be able to receive pictures in electronic form and load them into their desktop computing systems which can be equipped with photographic pre-press software such as Adobe, Incoporated's Photo Shop -- an affordable off-the-shelf software capable of image enhancement comparable to the million-dollar systems.[14] Several image data bases are already available in CD ROM form giving editors yet another source of digital photographs.[15]

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[10] Fred Ritchin, In Our Own Image: The Coming Revolution in Photography, Aperture Foundation, Inc., 1990, pp. 8-13.

[11] Ibid. p. 8.

[12] Ibid. p. 9.

The creation of composite images using computers clearly raises questions concerning false light invasion of privacy. "Without a direct relationship between the photograph and accompanying story, as well as an accurate and truthful presentation of a person in the image, false light invasion of privacy claims may find favor in the courts," Michael Sherer, a professor at the University of Nebraska-Omaha, wrote in a paper for the 1990 AEJMC convention in Minneapolis, Minn.[16]

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[13] Jeff Adams and Kurt Foss, "Electronic picture desk options," *News Photographer*, August 1990, p. 25.

[14] "PhotoShop opening in 1990; Adobe sheds light on image processor," 3 Oct. 1989, vol. 3, no. 35, p. 1.

[15] E. Sapwater and Kim Wood, "Observations and Solutions," *HighKey*, Spring 1989, University of Arkansas, p. 14.

[16] Michael Sherer, "Legal Issues in Elecctronic Alteration of News Photography," paper presented to the AEJMC Convention, Minneapolis, Minn., 10 August 1990, p. 4.

Libel

The courts have said that any question of photographic libel must be judged in the context of the accompanying story. In a sense, libel is much like false light invasion of privacy. If the picture and story work together to portray the person falsely, then grounds may be present for libel litigation. And if it can be established that a person would connect the individuals in a photograph with potentially defamatory accounts in the accompanying text, then the case may go before a jury for final determination.[17] Here again, the ability to obtain photographs electronically and connect them with unrelated news accounts may result in libel litigations.

In any libel case involving a photograph, four criteria must be met: 1) Statement by the image was defamatory; 2) The person in the image was identified; 3) Communication of the image to a third party; 4) Defamatory image was published due to negligence on the part of the photojournalist or due to willful disregard for the truth.[18]

One of the key elements of proving libel is identification of the subject. By using electronic alteration, the identity of a person could clearly be obscured. But then the question one must ask is under what circumstances would a newspaper intentionally obscure the identification of a person in a photograph? And if the newspaper has the power at its discretion, wouldn't that open it up to more litigation than simply choosing not to run the picture. "Imagine how easy it would be to show malice on the part of the news organization if it could be shown that an image had been electronically altered prior to publication,"

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[17] Ibid. p. 4.

[18] Sherer, No Pictures Please. . . ., p. 28.

Sherer wrote in his AEJMC paper.[19] The fact is, when the truth of an image is distorted through the use of electronics or otherwise, one of the fundamental defenses against libel -- truth -- is automatically disqualified.[20]

Emotional Distress

In 1987 an airbrush was used to take the image of a black firefighter out of a picture that was going to be used for a union newsletter.[21] The man taken out of the picture was the only black person contained in the photograph. A superior court in San Francisco gave the man the right to sue the union for emotional distress.[22]

Since what can be done with an airbrush may also be performed digitally on a computer it follows that emotional distress also falls within the realm of legal issues associated with electronic imaging.

Simply put, emotional distress is "the power of words or pictures to carry psychological, rather than reputational harm." A tort separate from defamation in many states, it exists in other states as part of the law of defamation."[23] Often times, to prove emotional distress one must still meet the grounds of libel or invasion of privacy in order to receive damages.

In an *intentional* infliction of mental distress suit, one of the primary elements that must be determined is that the offending party acted with extremely outrageous conduct that was either intentional or reckless. The courts have paid particular concern to the conduct of those who gathered and published the information looking for behavior that would constitute an extreme departure from the ordinary. At this point, one could make a sound argument that the alteration of news photographs is an "extreme departure" from standard photographic reporting techniques.[24]

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[19] Sherer, "Legal issues. . ." p. 4.

[20] Ibid., p. 4.

[21] "Airbrushed from photo, firefighter may sue," *News Photographer*, May 1989, p. 17.

[22] Ibid. p.17.

[23] Nelson, p. 126.

There is also *negligent* infliction of emotional distress. Under this concept, an individual must prove only that the publication of the offending image resulted in illness or other bodily harm. What is troublesome here for journalists is that the conduct need only be negligent, a concept far easier to prove in court than the "extremely outrageous conduct" requirement for *intentional* infliction of emotional distress.[25]

Copyright

One other area should concern all photographers whether they are involved in journalism or not -- copyright. Some of the most interesting litigation that may come about because of the new technology is in the area of copyright. Because images stored in digital form are so flexible and can be disseminated worldwide with extreme ease, the potential for copyright violations is immeasurable. "Clearly there are no simple answers," Sherer said in his AEJMC paper. "Just as this ability to electronically alter news photographs is in its infancy, so too are the legal issues that may be raised when this occurs."[26]

Copyright, or at least what we know as copyright today, can be traced back to England and the era of Queen Anne (1665-1714).[27] In the United States, the legal authority to provide copyright is granted in Article One of the Constitution:

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[24] Sherer, "Legal issues. . .," p. 5.

[25] Ibid. p. 5.

[26] Ibid. p. 7.

> "The Congress shall have the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[28]

The copyright of a work becomes the property of the creator as soon as it is established in "fixed form;" in the case of photography as soon as the shutter is released.[29] All original works may receive federal copyright from the moment of their creation regardless of whether they have been published. Creation, supercedes publication. A copyright for a photograph remains in place until 50 years after the death of the original creator.[30]

Newspaper photographers generally have little to do with copyright laws. Because they are under contractual agreement with the newspaper, photographers fall within the "work for hire" provision which gives ownership of the image to the person who hired the photographer.[31] For a news photographer this generally means the pictures he or she takes belong to the newspaper unless an agreement has been set forth in writing which states otherwise.

Where the copyright law associated with electronic imaging may get interesting is in the realm of magazine and free-lance photography. Many of the major magazines freely admit to tampering with pictures for a variety of reasons (i.e. extending the backgrounds so type can be inserted, taking

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[27] David Wise, "The right to copy," *HighKey*, Spring 1989, p. 12.

[28] Ibid. p. 12.

[29] Ibid. p. 12.

[30] Ibid. p. 12.

[31] Sherer, "No pictures please. . .", p. 39.

potentially offensive or extraneous subject matter out, etc.)[32] Most of the photographers who work for these magazines do so on a free-lance basis. Once the images have been shot, control leaves their hands. Or does it?

Say for example a photographer sells his or her pictures to a stock agency and is supposed to be re-imbursed each time they are used. The agency digitizes the images and distributes them on a compact disk to hundreds of clients. If a design firm uses a variety of parts from various pictures to form one image, how will the photographer ever be able to keep track of his or her product? Suppose part of an image is used to create a picture that portrays the subject in a false light and the subject sues for false light invasion of privacy?

Raphaele is a computer artist in Houston and works a great deal with electronically retouching photography.

> ". . .my policy is that if somebody brings me images, I will do anything with them they want, a special combination idea or whatever, because I assume they have gotten the copyright for those images. . . to me, you know, the ownership belongs to whoever has the copyright, and it's not up to me to just give an image to someone else."[33]

This ability to translate images into electronic information and then reuse the pictures either as a whole or in parts has serious implications for photography and copyright might be at the heart of the controversy. "There's going to be a test case," John Seibt of the Dallas Times-Herald said in HighKey magazine. " I venture to say there's going to be a case in court in the next two or three years."[34]

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[32] Ritchin, pp. 18-19.

[33] Sapwater, p. 10.

Summary and Conclusion

The upcoming years promise to be interesting ones as photojournalism expands into the electronic era. Although photographic manipulation has been going on for years, never before in the history of photography have individuals been able to make changes with the speed, accuracy and ease with which they can be done today thanks to computers. This, of course, could lead to several interesting court battles. Invasion of privacy, libel, emotional distress and copyright are among the main subjects that should concern photojournalists as the new technology begins to find its place in the newsrooms across the country in the next few years.

Much of the debate in photojournalism concerning the new technology will fall under the heading of ethics. While the courts will determine when journalists have gone too far in manipulating images, the biggest damage done by people using the new technology may be to the credibility of photojournalism. Editors and photographers must grapple with the question of how much manipulation of images is in fact too much? The answer to this question may not be known until the line is crossed and then there may be no going back. John Long, the immediate past president of the National Press Photographers Association, has been trying to formulate a set of ethical guidelines for newspapers. Many newspapers have also tried to set for written rules for picture manipulation as a means of coping with the changing times.

Still other photographers raise a valid point. Why should ethics change just because the technology does? Why indeed would a newspaper which has been

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[34] Ibid. p. 7.

soundly opposed to image manipulation suddenly change its practices just because it has the electronic technology to do so? Perhaps to make the news more exciting? Perhaps to make the product more marketable? Or just simply because the editor in charge wanted something moved?

Newspapers will make alterations electronically, it is inevitable. And whether they call it enhancement or something else, at some point a newspaper is going to find itself in court over an issue involving electronic editing. It may just take a minor change like the deletion of a Coke can, or it may be something as dramatic as the removal of an entire person from a scene. Either way, it will be up to the court to decide when the rules concerning libel, invasion of privacy and copyright have been violated.

A great deal of the outcome of any case involving electronic imaging will depend on the jurisdiction and the political climate of the times. Newspaper photographers have enjoyed a great deal of freedom in modern times when it comes to covering events and the pictures that run. But that could change if the new technology is used continually to push the rules governing libel, privacy and copyright. Because electronics do make altering photographic reality so easy, judges may come down hard on those who violate the law. These cases may, in fact, be held up for closer scrutiny than most.

Whatever the circumstances, the law will have to be considered closely as computer technology is used to produce news photographs for publication. Photographers and editors of the future will be wise to keep one eye on the photography and the other eye on the law.

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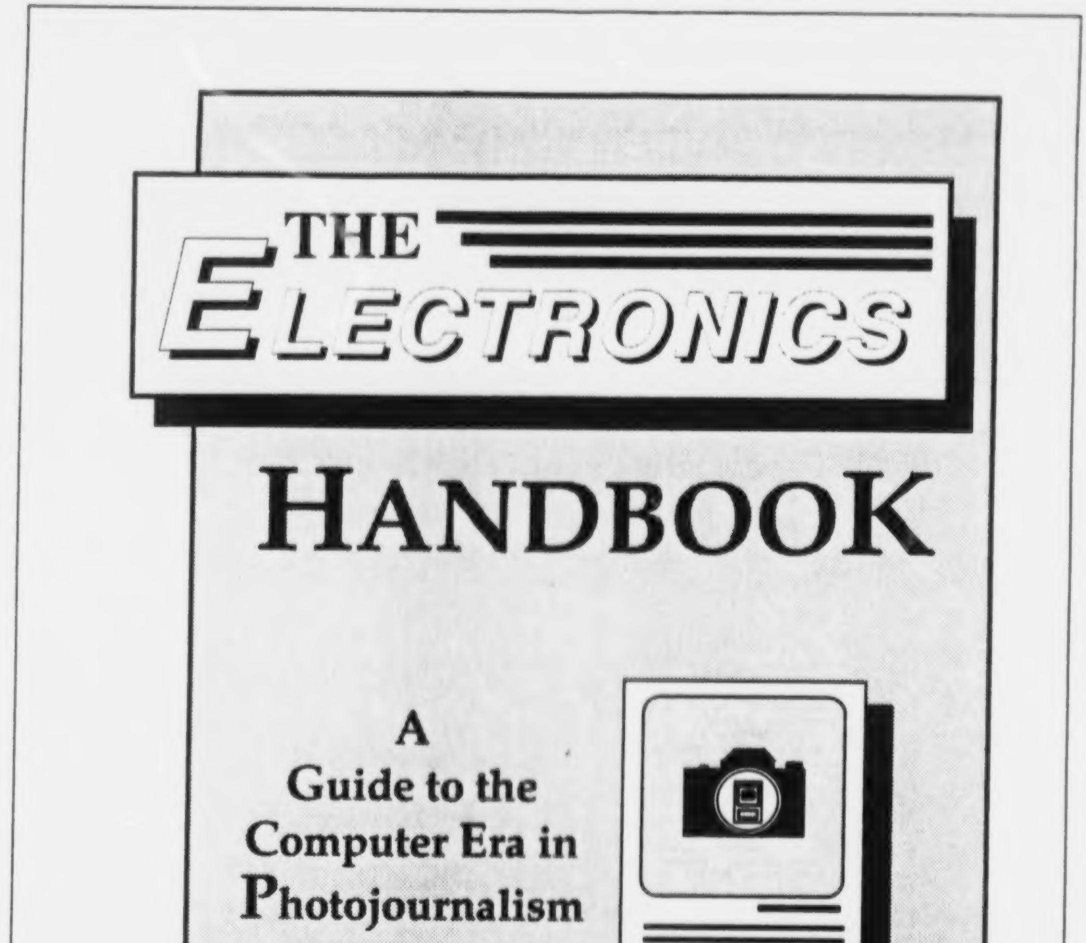


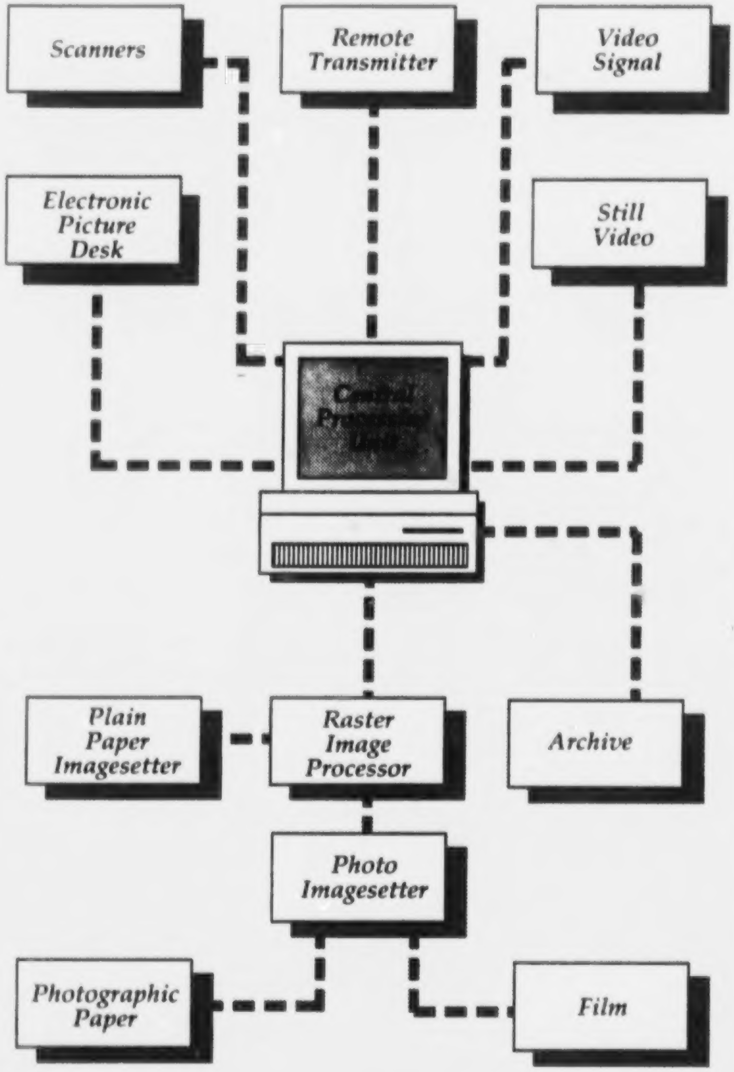
THE ELECTRONICS HANDBOOK

A Guide to the Computer Era in Photojournalism

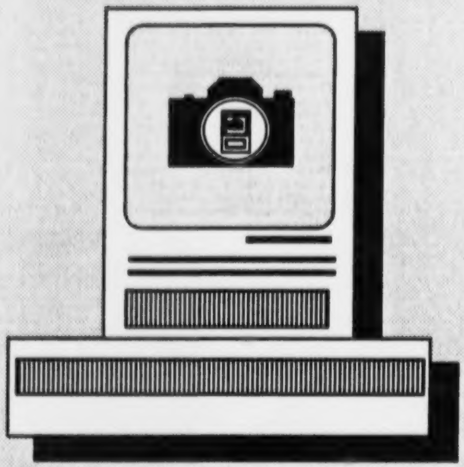
By Greg Peters
Edited by James K. Gentry

University of Missouri
School of Journalism
M.U. Electronic Photojournalism Lab

ELECTRONIC PHOTOGRAPHY DEPARTMENT


Scanners
Remote Transmitter
Video Signal
Electronic Picture Desk
Still Video
Central Processing Unit
Plain Paper Imagesetter
Raster Image Processor
Archive
Photo Imagesetter
Photographic Paper
Film

THE ELECTRONICS



COOKBOOK

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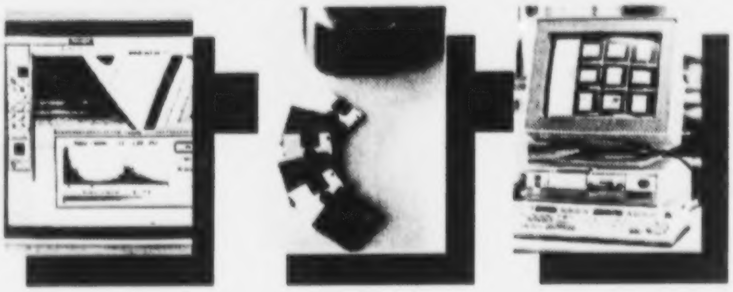
Columbia, MO
1991

THE ELECTRONICS COOKBOOK



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CHAPTER ONE

INTRODUCTION

Photojournalism has entered a period of enormous change. Just as 50 years ago 35mm cameras helped free photographers from the constraints of larger format cameras, computer technology is revolutionizing the way photojournalists practice their craft. From printing pictures to wire service photo delivery, nearly every phase of the photojournalism business can be done with computers.

Photographers no longer need to rely on conventional chemical darkrooms for printing. Instead, many photojournalists are using personal computers with the capacity to compose, print and output pictures using a full-color video monitor rather than a four-bladed easel.

The new breed of photojournalist works with bits and bytes of computer information where its predecessors toiled with dodging wands and chemical bleach. No longer are there hours of tedium in the darkroom away from the newsroom.

In a broader sense, the change in the photography department will require an adjustment for the entire newspaper. Electronic photojournalism is a naturally complement to newspapers that are switching to pagination. It can also provides the potential for color photography where it did not exist before. Additionally, the new technology expands the potential for quicker and more reliable remote transmissions.

A growing number of newspapers currently pass photographs directly into their pagination systems from the photography department's computer so pictures can be in place before the pages are output. The ultimate goal is to keep the information in electronic form as long as possible. Because halftones no longer have to be stripped in manually, the result is improved quality and saved resources.

Beyond changing the way pictures are printed in-house, computer technology is improving the quality and quantity of pictures available from outside sources. Digital information can be transmitted faster and more accurately than the analog sources now being used. Consequently, the availability of photographs transmitted from outside the newsroom is expanding.

Dial-up picture services that allow newspapers to buy only the pictures they need are currently being tested. Electronics systems also provide computerized archiving so editors can search specified databases.

The Associated Press has caused a great deal of the change by going on-line with its digital transmission system, PhotoStream, and the distribution of the Leaf Picture Desk – thereby forcing newspapers to enter into the electronics era, perhaps sooner than they are ready.

The new technology also means a big investment for newsrooms. From wire capture to imagesetters, there are massive changes ahead for most newsrooms. Setting up a personal computer-based system can cost a newspaper more than $100,000 depending on how much equipment is needed. Consequently, newspaper managers need to make smart choices as they assemble their systems. Unfortunately no clear answers exist. New users need to find out all they can from people who already have systems in operation.

By moving photographers out of the darkroom and into the newsroom, the new technology might help many photography departments play a more vital role at newspapers. This new presence in the newsroom could foster a greater understanding between the "word" and "picture" camps. Newsrooms with the new technology have already witnessed the knocking down of traditional walls and the reshaping of newspapers as never before.

As the ripples of change spread over the industry, editors and photojournalists find themselves needing new skills and knowledge. This book is intended to help meet their needs. Designed as a primer for those just getting started in electronic photojournalism, this guidebook is written from a journalist's point of view and not that of a computer technician.

Even with the book, there is still a DEFINITE need to have someone at the newspaper who understands how computers, photography and press technology interrelate. This book won't replace the computer technician needed to make it work. It will, however, provide an overview of the systems as newspapers seek solutions to the electronics puzzle.

The book follows a simple format. In Chapter 2, you will learn about the newsroom changes that come about with electronic imaging, and how to put together a system. In Chapter 3, you will learn about input devices and in Chapter 4 you will become familiar with image processing. Chapter 5 deals with output devices.

Legal issues are examined in Chapter 6. Questions of ethical handling of images are discussed in Chapter 7. The guidebook concludes with one of the most comprehensive glossaries of electronic imaging terms to be found anywhere.

These are exciting times for photojournalists and their publications. The new technology has great potential, but for all its advantages, the prospect of any kind of change can be frightening. We hope this guidebook provides the information you need in this new era.

Notes

CHAPTER TWO

MAKING IT WORK

'Why should I care?'

During the 1990s, electronics will change not only the way photographers go about their business but the entire newsroom as well. The familiar boundaries of newsroom, pre-press and pressroom will be dissolved in favor of departments whose bounds encompass several stages of the production process.

For example, some functions traditionally carried out by pre-press employees are becoming the domain of photographers or editors. Color separations, once the domain of pre-press, could become a function of an expanded photography department. Conversely, as pagination becomes a reality at newspapers, pre-press personnel might find themselves working at computer terminals in the newsroom flowing text into electronic page dummies.

These changes will not come without growing pains. The technology will take time to mature, but so will the attitudes of newspaper employees, including executives, and guild and union officials. Employees will have to adjust to changes in staffing, job definitions and legal and ethical considerations.

At the executive level, managers will have to be patient as time and money are invested to implement the new system. The new system might seem slower at first to department heads, but it can provide a greater variety and quality of pictures once all the problems are worked out.

This chapter examines a variety of topics associated with establishing electronic photography departments. The chapter includes examples of systems from newspapers already electronics. It illustrates how newspapers can integrate their existing equipment into a new system. The chapter also discusses the role the electronic picture desk plays as the hub of the electronic photography department. Finally it will discuss the reconfiguration of newspapers as computers come online.

- **Who should care about electronic photojournalism**
- **Electronic picture desks**
- **Building a system**

• Rebuilding the Newsroom

For many newspapers, going on-line with electronics in the photography department will require a whole new philosophy about picture production. The photography department might have to expand to encompass pre-press as well. Some newspapers will choose this juncture to go on-line with four-color photography.

The transition will include the creation of new jobs and job descriptions, plus the shifting of personnel between departments. Existing workers can be trained to do some of the new assignments, particularly pre-press employees displaced because of pagination. But other positions will require the hiring of employees with specialized skills such as advanced computer knowledge.

A key personnel question is who will process the pictures. Historically photographers or lab technicians have run film and printed pictures, which were passed on to the pre-press department for the production of halftones or color separations. The new technology requires the user to have not only a knowledge of photography but a comprehension of pre-press and pressroom technologies.

Some newspapers are coping by having photographers do the actual computer scans and enhancements and then a technician makes the necessary adjustments to make the picture reproduce well when it runs on the press. Others let the technician do all the work, but the photographer is allowed to observe to help protect the integrity of the original photograph.

In the emerging newsrooms, photography editors must not only be conversant in the cragt of photojournalism, but knowledgeable in pre-press and press technologies as well. It's a cross-disciplinary burden that many editors and photographersare unprepared for. Likewise department editors will have to have a working knowledge of how the new technology can work to their advantage.

• Electronic Picture Desks

Possibly the single most pivotal decision most newspapers will have to make when building an electronics system is the type of electronic picture desk(s) to purchase. The picture desk, including the central processing unit for picture production, is the heart of the system. Nearly every picture, wire or local, will have to pass through the desk on its way to the printed page.

Before discussing cost or personnel involved in bringing the new technology on-line, the newspaper must establish the role photographs play in the publication. If a newspaper does not run many photographs, or is not overly concerned with reproduction quality, then it might not be worth the time and effort it takes to get involved in electronic photojournalism. If a newspaper uses several photographs a day – running them prominently – then the speed and quality of a picture desk can make or break the operation.

POINTS TO CONSIDER

- Who will oversee the changeover to electronics?
- How many electronic picture desks are needed to handle the work load?
- Who will be allowed to enhance/manipulate pictures?
- How will picture editors get information from section editors that used to be written on the back of pictures?
- Who will control the output of pictures from the picture desk?
- Will you need a plain paper proofer for cutlines and/or budget meetings? If yes, will one be enough?
- How will you archive pictures?
- Who will pay for the chemistry to produce the halftones and color separations?
- How many scanners do you need?
- Who will manage the system?

Contributed by Ed Cuddihy, the *Buffalo, N.Y., News*

One myth associated with the new technology is that because a newspaper has more pictures available, it will change its photographic philosophy. More pictures means a wider selection, but it does not follow that a newspaper will change its ways just because there are greater options to choose from.

An electronic picture desk must allow the operator to be able to sort photographs quickly and efficiently. Editors need to decide how many terminals in the newsroom will be available for viewing images. Some newspapers might want to establish viewing terminals in every department, but lock out editing functions so control remains in the hands of the photography department.

Others might want to let individual departments do their own editing and pre-press functions before passing them to another department for output. This will, of course, place more demands on the time of employees in the individual departments and might require the expansion of newsroom staffs. It also brings into question whether or not a newspaper can maintain both ethical and quality standards if a myriad of operators has access to high-powered enhancement programs associated with the picture desks.

This might not even be a question at newspapers that have a strong union influence. The creation of halftones and color separations is considered a prepress function by many unions so no editorial department employee could do the enhancements even if the technology was available. This may become a point of negotiation and compromise.

Newspapers will have to decide between open-architecture versus proprietary systems when trying to decide which desk to buy. Open architecture gives the newspaper the option of building onto the system whenever new hardware and software become available. Proprietary systems, meanwhile, come from one vendor and so a technician would be able to analyze the entire systems when support is needed. Even among the proprietary systems there is becoming an increasing demand to become partially open architecture. This would make the systems more versatile.

Newspaper leaders will also have to ask themselves if a small computer-based system is powerful enough to support the number of pictures they are trying to publish each day. While the initial price tag may seem lower for these systems, if they can't get pictures out fast enough to meet deadlines.

• Building a System

Putting an entire functioning system on-line – from the electronic picture desk to the imagesetter – can cost easily more than $100,000. This is a large amount of money to put out considering much of the technology will become obsolete in the very near future. Some experts speculate as early as the three years or less.

Money is one of the biggest concerns when going on-line with an electronics system. Granted one of the big advantages to electronics is improved picture quality, but the bottom line for newspaper executives is can the system save money? Here again, there are no clear answers.

Executives need to look at the equipment they already have in-house when getting started. The situation varies from newspaper to newspaper, so there is no clear cut answer for the transition to electronics.

One of the keys is the output device – is it equipped to accept picture files and produce them fast enough to meet production needs? Some newspapers can bypass a major expense if their imagesetters are already capable of image file processing. Some newspapers can get by with a less expensive upgrade of an existing imagesetter rather than buying a new one. There are also reconditioned units on the market that sell for considerably less than the new ones.

Newspapers may also have computers in hand that could be used for image processing although they should be extremely careful to make sure the work load on the machines is not already at a maximum level. Don't overload a computer just to save money; the system will inevitably crash on deadline.

Newspapers with electronic picture desks should be able to save money by no longer receiving bromide prints of wire service photographs. They can also save money because they do not make any local prints. But the with no print available, archiving images becomes a problem. Also, newspapers must decide what kind of print will be used for cropping, sizing and design?

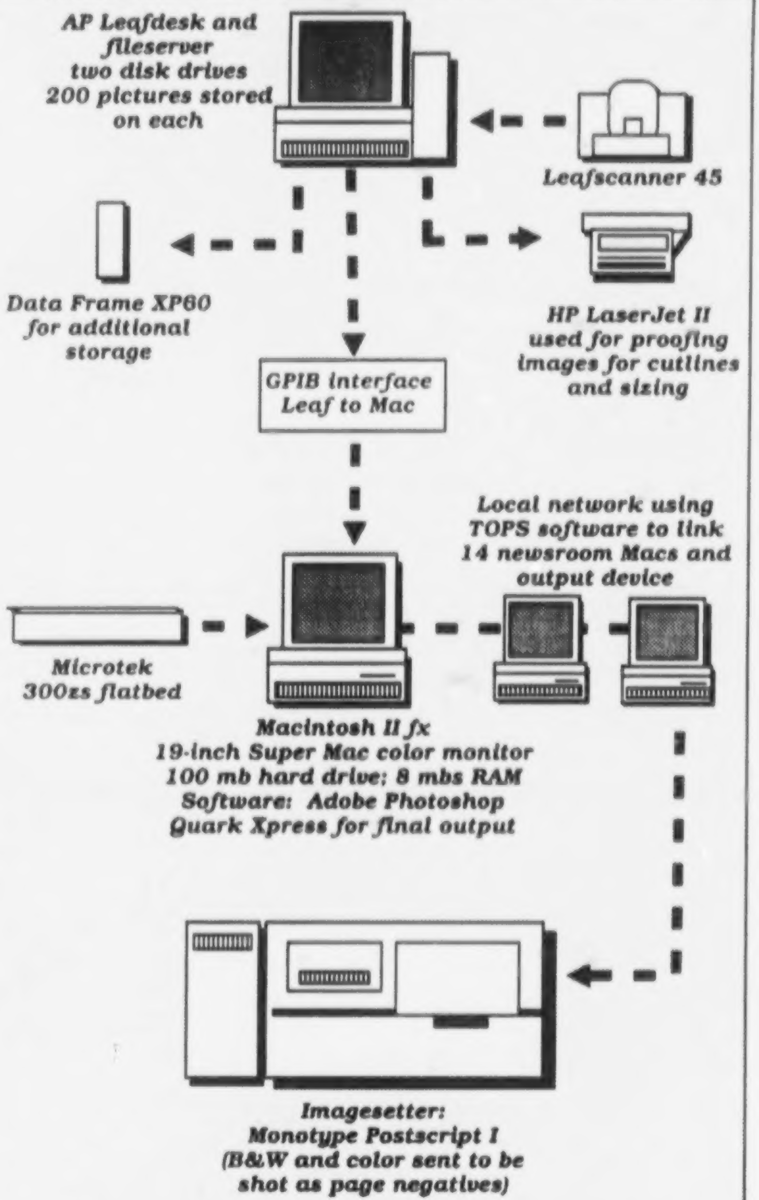
Another key question is whose budget will absorb the cost of color separations and halftones? If the photography department does the separations on the computer, do film and processing costs come out of its budget? Who pays for proofing materials? Is more personnel needed to help do separations?

These seemingly routine issues must be addressed up front. If they are not, they can cause the kind of frustration with the new technology that has led at least one photographer to say that he would not admit having computer experience when he seeks another job.

Newspaper executives should carefully analyze what they want their systems to do. Do they want to produce all their pictures electronically or just wire photographs? Staying with a conventional wire photo receiver might be good enough in the short term while the new technology comes of age.

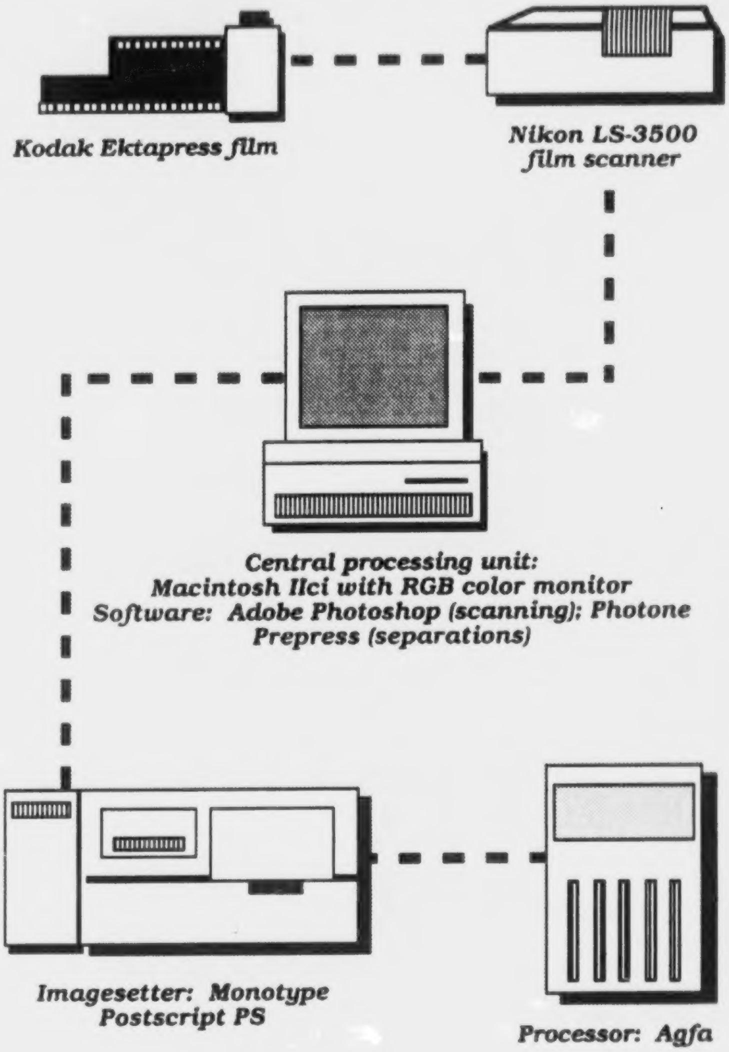
Patience is a key in approaching new technology although newspapers can't afford to ignore the changes in the industry. Executives need to be patient with their people as they learn what the new technology can do in production situations. The leaders also need to be patient because technology is changing extremely fast.

For information on how three newspapers have put together systems, please see pages 20-22.


AP Leafdesk and fileserver two disk drives 200 pictures stored on each
Leafscanner 45
Data Frame XP60 for additional storage
HP LaserJet II used for proofing images for cutlines and sizing
GPIB interface Leaf to Mac
Local network using TOPS software to link 14 newsroom Macs and output device
Microtek 300zs flatbed
Macintosh II fx
19-inch Super Mac color monitor
100 mb hard drive; 8 mbs RAM
Software: Adobe Photoshop
Quark Xpress for final output
Imagesetter:
Monotype Postscript I
(B&W and color sent to be shot as page negatives)

Vincennes, Ind., Sun-Commercial

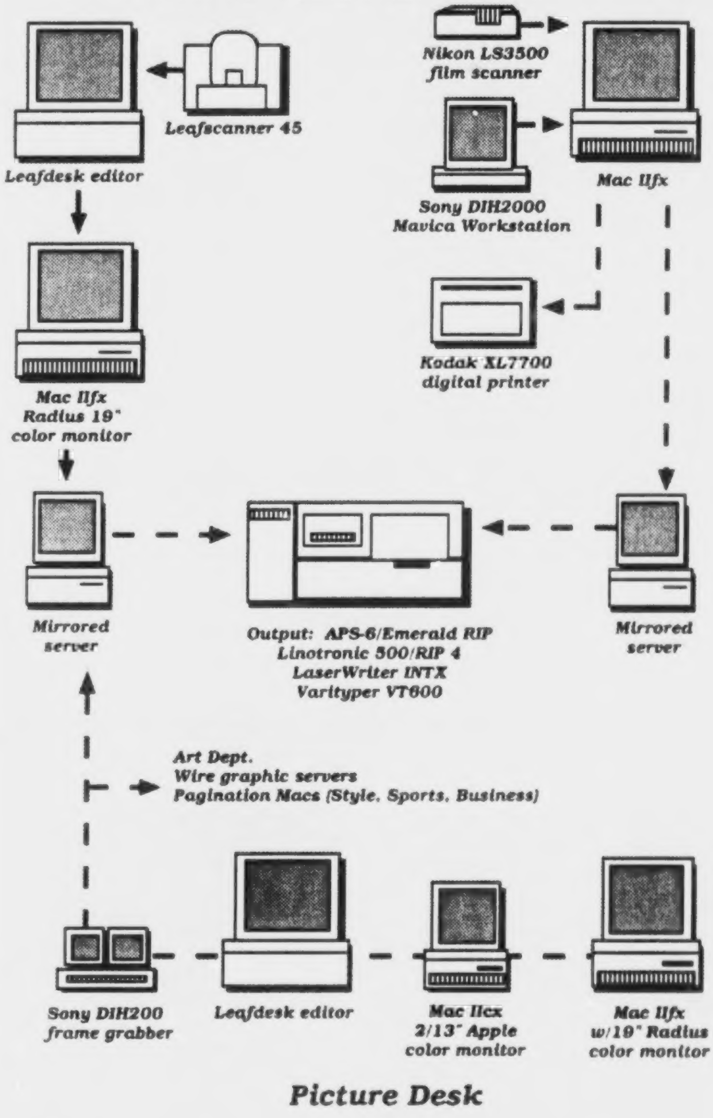
Mark Crowley, Photography Editor 812-885-2233
Circulation: 15,000


Kodak Ektapress film
Nikon LS-3500 film scanner
Central processing unit: Macintosh IIci with RGB color monitor
Software: Adobe Photoshop (scanning); Photone Prepress (separations)
Imagesetter: Monotype Postscript PS
Processor: Agfa

Independence, Mo., Examiner

lin Braley, Photography Editor 816-254-8600
Circulation: 18,000

Photography Department


Leafscanner 45
Leafdesk editor
Nikon LS3500 film scanner
Sony DIH2000 Mavica Workstation
Mac IIfx
Kodak XL7700 digital printer
Mac IIfx Radius 19" color monitor
Mirrored server
Output: APS-6/Emerald RIP Linotronic 500/RIP 4 LaserWriter IINTX Varityper VT600
Mirrored server
Art Dept.
Wire graphic servers
Pagination Macs (Style, Sports, Business)
Sony DIH200 frame grabber
Leafdesk editor
Mac IIcx 2/13" Apple color monitor
Mac IIfx w/19" Radius color monitor
Picture Desk

San Francisco Examiner

Chris Gulker, Photography Editor 415-777-8340
Circulation: 140,000 daily, 700,000 Sunday

Notes

CHAPTER THREE

INPUT DEVICES

Input systems are simply the hardware and software needed to get an image from the film, print or disk form into the computer for processing into a halftone or color separation. This is done by translating the information into digital form so that it can be understood by the computer that is being used to process the image.

Don't be afraid of the new technology or the unfamiliar jargon that is being tossed about. The best analogy is to think of the new systems in the terms of driving a car. Most people are able to drive without knowing much about how the motor works in their car. It's the same with computers; once the system is established all the staff photographers should be able to use it without many problems. And those photographers who choose to know something about why the computer works will be well ahead of their peers when a mechanical breakdown should occur. A good mechanic (technician) is also needed to keep the system running smoothly.

This chapter will explore the various devices needed to input pictures into the central computer for processing and output. Listed below are the sources for image input that will be discussed.

- **Electronic Picture Desks**
- **Scanners**
- **Still video**
- **Video Frame Grabbing**
- **Portable Transmitters**

• Electronic Picture Desks

This is a generic term that refers to electronic picture management systems (EPDs for short). Simply put, this is the computer that can electronically route incoming wire photos and telephone transmissions (LDs) into specific categories such as news, sports and features for storage and processing. The information is captured digitally and transferred by the user into designated batches.

Many picture desks can also function as the electronic darkroom for the preparation of halftones or four-color separations. They can do varying amounts of cropping, scaling, burning and dodging of images. These machines are then considered central processing units or electronic darkrooms for your system. This can be an advantage or disadvantage.

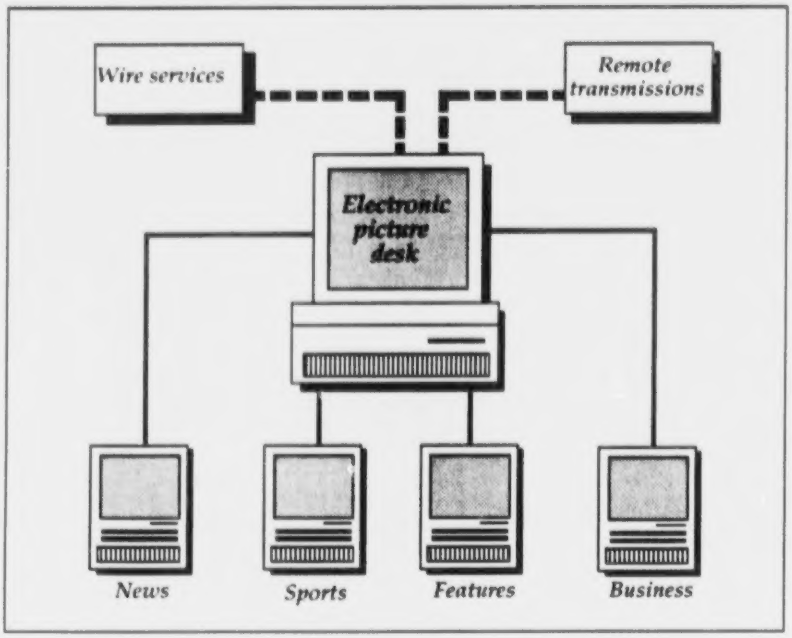
The advantage of this system is that only one machine is needed to receive and process wire photographs. This simplifies the process, and most picture desks with enhancement capability will do an acceptable job of image preparation for newspaper reproduction.

One of the main disadvantages is that a machine being used for image enhancement cannot be involved in picture sorting or other tasks. Pictures are still being received with most systems, but only one on-screen task can be done at a time. This can be solved, however, by porting the images over to other terminals in the news room if your system has that capability.

Electronic picture desks are currently available from several vendors who provide a variety of options (see appendix). Most newspapers that use several wire photographs should investigate the various available options. A word to the wise: be wary of a company that says its system will be able to do a specific function in the future, that it can't do right now. Photographers may grow old waiting for the upgrade.

CHECK LIST

- **Compatibility**
- **Versatility**
- **Wire service compatibility**
- **Proprietary vs. open architecture**
- **Screen-to-press calibration**
- **Archiving**
- **User friendliness**
- **Technical support**


Wire services
Remote transmissions
Electronic picture desk
News
Sports
Features
Business

When shopping for an electronic picture desk, managers should select desks giving them the options they need most. Shop around, and pick a picture desk that gives a good base of options but doesn't limit the newspaper's ability to add on to the system. Also, look for a system that provides good support to its clients. With any kind of new technology, there is bound to be down time, so a product is only as good as its support system.

There are two terms associated with most electronic picture desks that most interested persons should know: **proprietary** and **open architecture**. These are the main operating strategies involved in establishing EPDs.

Proprietary Systems

Simply, EPDs that are not open to modification by the owner are classed as proprietary. The manufacturer must do any upgrading, modification or repair of the hardware or software. These systems are designed to handle specific functions defined by the manufacturer.

If a newspaper wants to do more advanced image enhancement than the machine had been programmed for, the manufacturer would have to make the adjustment. These systems can't use off-the-shelf software available to other EPDs unless the manufacturer builds the capabilities into the computer.

Open Architecture Systems

Systems based on personal computers or minicomputers are referred to as "open architecture" because they can be modified by the user to meet specific needs. These systems are limited mainly by the existence of software to suit the user's purpose. Newspapers can use a variety of off-the-shelf software to build a system (see appendix).

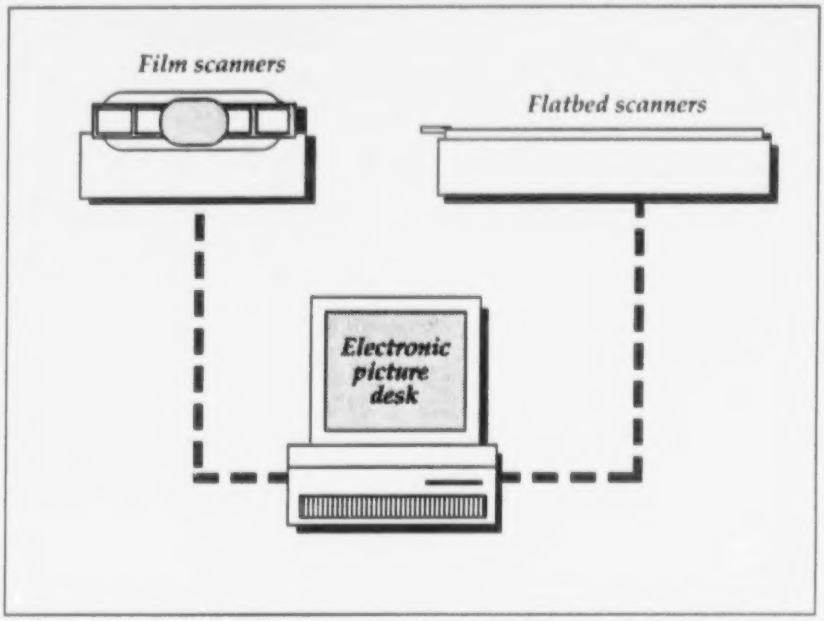
Building a system can be a challenge without a skilled computer technician on staff. Open architecture systems give the user many more software options, but it may be simpler to use a proprietary system if adequate technical support is not available.

Many of the proprietary systems can communicate with open architecture systems. This way an image can be received on a proprietary unit, which is used for sorting, but then other computers in the newsroom are used for the actual picture production. This cuts the demand for time on the proprietary system and opens up several options on the open architecture system that is built to the users specifications.

• Scanners

Scanners are the electronic devices used to convert either film or reflective materials (photographs, drawings, illustrations, etc.) into digital information for processing in the computer. Scanners come in a variety of forms, but for newspaper work the two main categories are flatbed and film (see appendix). Each type has its own specific advantages and disadvantages, and the quality of the scanner also varies from vendor to vendor.

Here again, before making a decision it's a wise to talk to someone who has actually used the type of scanner you are planning to buy before making a decision. Production ability is what counts, not promises in a brochure. The scanner must also be compatible with the computer hardware and software selected for the central processing unit.



Flatbed Scanners

Flatbed scanners work from prints created in a conventional darkroom. The machine operates on the principle of a linear charged coupled device (CCD) that travels beneath the platen in synchronization with an illumination source. These scanners can reproduce either color or black and white images, but transparencies generally must be converted into prints.

Prints must be made within specified dimensions so that they will fit on the scanning surface. By using original prints, photographers have greater control of dodging and burning than their totally electronic counterparts. This can be a big point of contention not only in terms of production quality but photographic integrity. The ability to burn and dodge subtly and accurately will change, however, as production software becomes more sophisticated. Newspapers dealing mainly in color find they do far less dodging and burning with color film than they do when working with black and white film.

ADVANTAGES	DISADVANTAGES
Less expensive than film scanners **More accurate dodging and burning on conventional prints** **Montage work without difficulty** **Don't have to worry whether the film size fits the scanner**	**Requires the user to make a print or provide a reflective image** **Lower quality than film scanner** **Illumination is less consistent** **Usually requires more desk top space than a film scanner**

Film Scanners

These scanners do just what the name implies: they use optical technology to scan conventional film. One of the big advantages is that no print has to be made. The image can be taken directly from the negative thus eliminating the need for conventional printing facilities. Film scanners work from either negative (black and white or color) or transparency film. They also can even convert color pictures into black and white.

ADVANTAGES

- **Better quality than flatbed or still video**
- **Truer conversion of light to electronic signal**
- **Smaller than most flatbed scanners**
- **Offer up to 36 bit color resolution**
- **Film is illuminated more accurately for scanning consistency**

DISADVANTAGES

- **No original print to archive**
- **Not all film sizes can be used with each brand of scanner**
- **Must remember to set film type be fore each scan for best results**
- **Takes more time to come on-line**

• Still Video

One of the most dramatic innovations to photojournalism in the past 50 years is the invention of the still video camera (see appendix). Although probably several years from being an everyday tool for most newspaper photographers, the new cameras have already found a place in the journalistic community: covering events so close to deadline that no conventional method could be used to get the picture.

The likelihood is that still video will probably never totally replace film-based photography. Much of the excitement that occurred when the cameras first came out was based more on conjecture than substance. Still video's main advantage is that there is almost no processing time, but many photographers say there will have to be a marked improvement in the quality before it can become a tool for daily use. With still video a photographer simply makes the edit on the fly using the still video disk player, and transmits the image back to the office via telephone lines. This allows the photographer to work until deadline without worrying about processing film.

Analog vs. Digital

Still video users face a choice of analog versus digital just like all other aspects of electronic photojournalism. Analog technology has led the way since the beginning of still video, but several companies are working to make digital a viable force. All analog images must be converted to digital at some stage for computer processing so it is only logical to record the information digitally and remove a generation of image translation.

Still video analog is a means of magnetically recording an electronic image to a disk (2" floppy). To this point many people have used the terms still video and digital imaging interchangeably. This is not the case. What is recorded on the disk is an analog message. A still-video player reads the disk and displays the images on a video monitor for editing. Video signals produced by the recorder are digitized using a video frame grabber. Once digitized, the images can be enhanced using image editing software on a personal computer.

ADVANTAGES

- Speed
- No darkroom required
- Immediate viewing of pictures
- Portability

DISADVANTAGES

- Low image quality
- Low range of film speeds
- Unfamiliar technology
- Expensive equipment

Photography based on computer disks is both a blessing and a curse. On one hand, the disks are reusable so there is a considerable savings on film. But this can also cause a problem in the archiving of images. A photographer in the field cannot save an individual image without transmitting it to the office. This can be a problem when the photographer is forced to blank the disks as he or she goes along and does not have time to transmit back all the desired images.

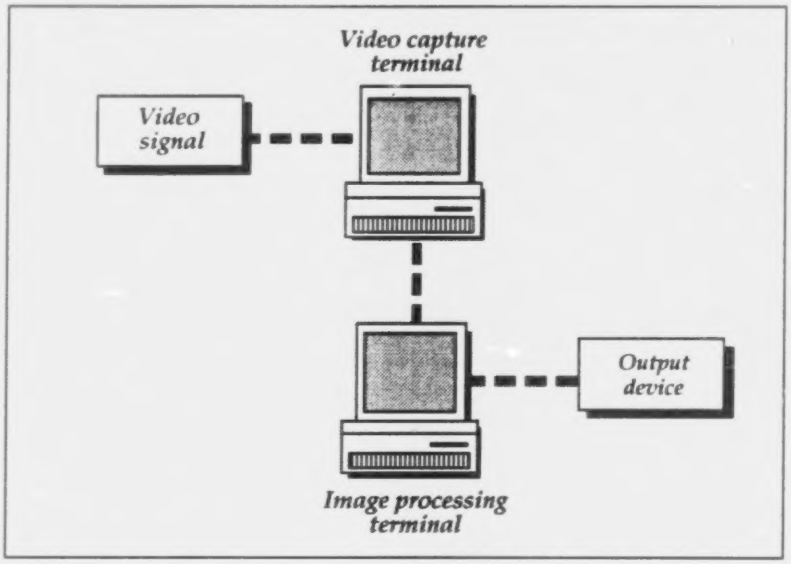
Today's digital cameras capture an analog video signal but convert it immediately to digital information for storage. Still video digital systems are currently prohibitively expensive for most use even among newspapers. But this is one of the areas where most of the research is being done in still video and the technology is rapidly changing.

The main difference between analog and digital still video is that the digital system is designed to convert the information received immediately from analog to digital before storage. The images are also compressed in the system allowing more pictures to be saved. Development of an affordable and effective digital still video system is the first step toward competing with film photography.

• Video Frame Grabbing

Thanks to the new softwares and hardware packages, the desktop computer can also be used as a camera (see appendix) -- at least in the sense of capturing images from television over both the airwaves and cable.

Frame grabbing from video signal is a relatively new technique, but the concept of taking pictures from television has been around for some time. However, photographers have been able to get only marginal quality by shooting pictures directly from television. By changing the video signal into digital form within the computer, two generations of translation are bypassed, and the potential for quality improvement is increased. This might have greater implications when high definition television comes on-line.



The system needs a video monitor to view the image coming in and one to do the image processing. The computer must include a video capture board and appropriate software to translate video information into an appropriate format for the central processing unit to read. This process is experimental at most newspapers and impaired by relatively slow "shutter" speeds (roughly 1/30th). The process must accommodate the time the television takes to scan the image onto the entire screen.

One of the keys in print quality is how clean the video signal is. The less muddled the signal is, the clearer the picture. A signal taken directly from a satellite dish should be cleaner than one received via a cable system. By using a high-quality video recorder the user can capture the exact moment desired rather than trying to "catch" a live picture.

Ethical and Legal Issues

Frame grabbing is a hot legal and ethical topic. With increasingly higher quality images available from broadcast signals, the use of new technology to frame grab might become a standard practice for some newspapers.

Ownership of images broadcast over the public airwaves will be a difficult dilemma the industry must solve. Pictures that some editors believe are within the public domain because they have been broadcast on television might actually be the copyrighted possession of a television station. This situation is muddled by the inclusion of images broadcast over cable networks whose subscribers must pay for the service. Photographers have always been able to shoot pictures of the television screen, but now the technology allows for the film stage of this process to be eliminated and a much higher quality photograph produced electronically. The result is a greater temptation to collect photographs from video sources, especially when no other source can provide the pictures.

NETWORK CONTACTS

- **CBS Bob McCarthy (212-975-3523) case by case approval**
- **NBC Blanket permission with credit**
- **ABC Peter Murray (212-456-6710) or Brent Peterson (212-456-6709) case by case approval**
- **CNN Steve Haworth (404-827-1547) case by case approval**

Newspapers also have an ethical decision to make. By using these images the are trusting in a television network to provide untampered visual images. That is a huge amount of trust to invest in times when television stations are broadcasting home videos provided by private sources and "news hound" tapes. Newspapers must also decide how to credit the picture. Granted the image is provided by the network, but it is a newspaper employee who decides at what "decisive moment" to press the button and capture a frame from the video feed.

• Portable Transmitters

Another way of introducing images into the electronic system is through the use of portable transmitters (see appendix). Most newspaper people are familiar with the drum transmitter that has been the industry standard for some time. These are steadily being replaced by computerized units that operate from negatives or slides thus eliminating the need for prints. But electronics technology is opening even newer doors in terms of the transmission of photographs from remote locales. The next few years should see several changes. What seems like it's on the cutting edge today might be left in the dust in the near future.

Analog vs. Digital

As the Associated Press begins to implement its digital picture delivery system, PhotoStream, many newspapers will receive wire photographs in digital form for the first time. Digital technology has a great deal to offer in terms of quality and speed (two minutes a picture versus nine with analog), but one of the big problems is having the software to keep up with digital technology. Most newspapers are well equipped to handle analog signals but digital is a whole new ball game.

Analog information is in a continuous-scale electrical signal (like an ocean wave). Digital information is expressed numerically. A digital image contains information in computer data form making it more precise and easier to handle.

Many of the new electronic picture desks will accept either digital or analog signals. The problem is that the AP digital receiver being offered along with PhotoStream can't handle the analog signal from remote transmitters such as the conventional drum. This can be overcome by keeping the analog receiver for LD transmissions only, but using the digital receiver for wire photos. This would leave many newspapers with redundant systems and require the upkeep of two machines (one of which has only a limited use).

The main limitation to digital transmission is the size of file it takes to store the image. A typical digital image takes up about 3 megabytes (Mb) of digital information. Currently an analog picture takes about nine minutes to transmit. That same image in uncompressed digital form sent at a relatively high speed (9600 baud) would take about 41 minutes to send over conventional telephone lines.

Faster digital transmissions are possibly only if the image file size is compressed using a method of computer shorthand. Compression applications now available can shrink the image substantially for transmission without damaging the quality of the photograph. Compressing the image can speed the time needed for a transmission to less than five minutes. The trick is, once the image is compressed, you must be able to decompress the image on the other end, and many times that requires the purchase of additional hardware.

CHAPTER FOUR

IMAGE PROCESSING

The personal computer has been called the "civilized" darkroom because it eliminates the need for hours of work in the dark by moving photo preparation into the newsroom. Nearly every function available in the conventional darkroom, from dodging and burning to cutting and pasting, can now be performed on the computer screen. The new technology allows for image alteration with ease and accuracy never available in the past.

This does not mean, however, that the new technology should be abused for practices previously unacceptable in the photojournalism community. Journalists need to take a close look at their accepted ethics before embarking on the road to electronics. The new technology means a system of printing that can help eliminate many of the tedious hours spent in the darkroom and allows the photographer to take a more active position within the newsroom. But moving into the newsroom also means more eyes watching a process that was formerly the exclusive domain of the photographer.

The new technology will require a learning period. Photographers who are adept with a dodging wand and bleach brush will likely need some time to learn how to expertly control the computer's mouse. Once this learning curve has been passed, photographers should be able to accept the computer as just another printing tool. This will also be a means of keeping control of their photographs through another stage of the printing process.

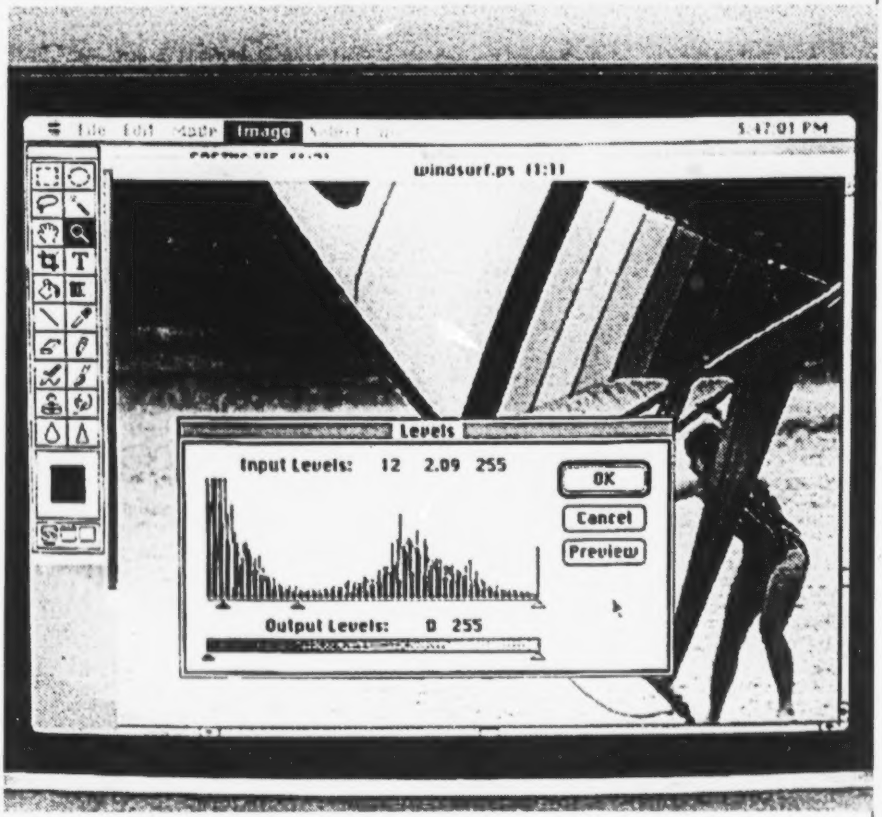
This chapter will outline the major steps needed to prepare photographs to be transferred on to the imagesetter for output.

- **Rotation**
- **Cropping and sizing**
- **Levels adjustment**
- **Manipulation**
- **Sharpening**
- **Rule lines and screens**

• Rotation

Images scanned in from either a flatbed or film scanner frequently appear on the monitor sideways or upside down. This can be controlled before scanning, but once the information is in digital form it is often easy to remedy on the computer screen.

Some of the desktop programs include a rotation function that allows the user to turn the image as it is



Input Levels: 12 2.09 255

Output Levels: 0 255

viewed on the screen. The turns are made at 90- or 180-degree intervals in most cases. Some of the more powerful computer programs allow the user to set arbitrary intervals for rotation. This is a particularly nice function because photographs can be turned as much or as little as needed.

Rotation is fairly simple to do, but it will usually take the computer several seconds to complete the task because of all the mathematical remapping of pixels that must be done. The more powerful the computer, the faster the change.

• Cropping and Sizing

The computer allows the photographer to crop and size a picture on the screen. This way the decision of how a crop is made is no longer left soley in the hands of the designer on the copy desk. Working together, the photographer, picture editor and page designer can come up with the appropriate crop for the size and space available, then the user makes the adjustment.

Some software programs let the photographer go inside an electronic tool box to pick a cropping tool or sizing icon. The final picture size can usually be chosen in inches, picas or points.

The operator then uses the mouse to sketch a crop box on the screen over where the picture appears. The box appears proportional to the dimensions programmed into the cropping tool. The photographer can reshape or redraw the box by simply clicking the mouse. Once the crop is made, the photographer can revert back to the original uncropped file in some software systems. It is a good idea to save a copy of the original file and work on a copy in case mistakes occur, or the editors choose to resize the photograph after it has been printed.

OPTIONS

- **Sizing done in inches, picas or points**
- **Resolution variable but usually set at two times the dot screen**
- **Crops can be changed up until the time the file is saved**
- **Images can be rotated on the screen**

At this point the photographer needs to set the resolution of the picture in pixels per inch (ppi). This is important to do now so that the picture, which is mapped out in pixels, can maintain a continuous tone when run out as a halftone on film or photographic paper. A general rule of thumb is to set the picture resolution at roughly two times the line screen used by the newspaper. For example, users at a newspaper that screens its halftones with an 85-line screen would set the resolution at 170. Photographers need to experiment with output to fine tune the system for their environment. Extremely large photographs need to have a higher level of ppi.

• Adjusting Picture Levels

Once cropping and sizing have been done and the resolution is set, the printer can move on to picture enhancement. Some software programs allow for only global alterations. Simply put, in these programs the entire image is altered by a single computer command. However other programs let the user pick specific areas and make alterations to those portions of the picture.

Computer users have a variety of other controls at their fingertips. By clicking on an adjustment menu, the user can adjust the brightness and darkness of the photograph as well as the contrast. The photographer can also use another set of controls to alter the color within a photograph.

One of the critical challenges about electronics technology is getting the image on the screen to match that reproduced in the newspaper. Most computer monitors have a greater capacity to display color than the printed page, especially the course stock used for newspapers. This presents a particular problem as photographers try to match the image on the screen with the printed page. People already involved in electronics fight an almost daily battle to get WYSIWIG (What You See Is What You Get) color from their computer screen to come off the printing press.

All sorts of variables can alter a picture as it goes from computer screen to printer's ink:

- **Lighting and the environment in the computer area**
- **Brightness adjustment on computer**
- **User's color perception**
- **Dot gain on the press**
- **Printing done by someone other than the photographer**
- **Ink type**
- **Angle of screens**
- **Lighting in the press room**
- **Use of calibration tools to adjust color**
- **Misaligned plates**

Despite all the possible mistakes, many newspapers are producing good images using seat-of-the-pants calibration to get the monitor image to match the press output. As the technology advances, more and more simple-to-use calibration programs will come onto the market.

When a newspaper starts using the new technology, it should form a production team to monitor the pictures in the paper. The team should include representatives from photography, pre-press, the pressroom and the editorial department to provide objective feedback on the appearance of the photographs. The group should keep close tabs on output by using densitometer readings and color calibration bars. Weekly meetings will help the group establish a protocol for monitoring the system. Other newspapers have found that staffers need to be patient while the new equipment comes on-line. Electronics will eventually earn a place in the newsroom, but it will not come without growing pains.

• Image Manipulation

The new tools can also be used for image manipulation. Some will call this enhancement or alteration, but whatever the name, the function is still a manipulation of what was on the recorded film. In the right hands, these are powerful tools that can make pictures better.

Software packages allow users to remove imperfections in photographs. For example, dust spots on a print or negative can be removed easily with the new technology. The computer can also be used to remove line "hit" that occur in wire transmissions. Most newspapers would consider these routine adjustments.

Computer programs that allow specific areas of an image to be selected can be used for dodging and burning. Thus far traditional dodging and burning have proven more successful in making the subtle gradational transitions that photographers desire in a picture, but the day is coming when computer dodging and burning will rival the work done by photographers in the darkroom.

One fear photojournalists have is the ease with which computer information can be cloned, selectively removed or outside matter introduced into a picture. The industry has already felt the brunt of such abuses. Some of these techniques can be used creatively to produce photographic illustrations, but they have little place in the production of news photographs. Newspapers might want to consider labeling computer illustrations.

• Sharpening

Nearly every image needs some form of sharpening. This usually is not a matter of making the picture sharper than the image on the orginal negative. The user sharpens an image in an effort to match the shaprness of the negative. Some additional sharpening of can be done on low-end systems, but these images usually appear altered when this is done.

• Adding Rule Lines and Screens

Once image manipulation is complete and the photograph is ready to go to the output device, the user needs to choose the preferred line screen. This can be done by making a selection in the menu that gives page preferences. The user normally has several options for line screens as well as the shape of the dots to be used. This is foreign turf for many photographers but once a workable system is established, the user can simply set predetermined numbers and send the picture to the printer.

Before sending, the software allows the user to establish rule lines of various size around the photograph. The lines are extremely sharp and accurate, which saves the composing room considerable time. The user can also pick calibration bars, crop marks and other additional functions.

CHAPTER FIVE

OUTPUT

Getting the image onto the printed page might be the single most expensive step many newspapers will take as they enter the era of electronic photojournalism. It is also one of the most important. The imagesetting device determines the quality a newspaper can expect from its electronics system. Without good imagesetting equipment,the system will fall short both in speed and quality. The cost of an imagesetter could double and even triple the total price tag for an entire electronics system.

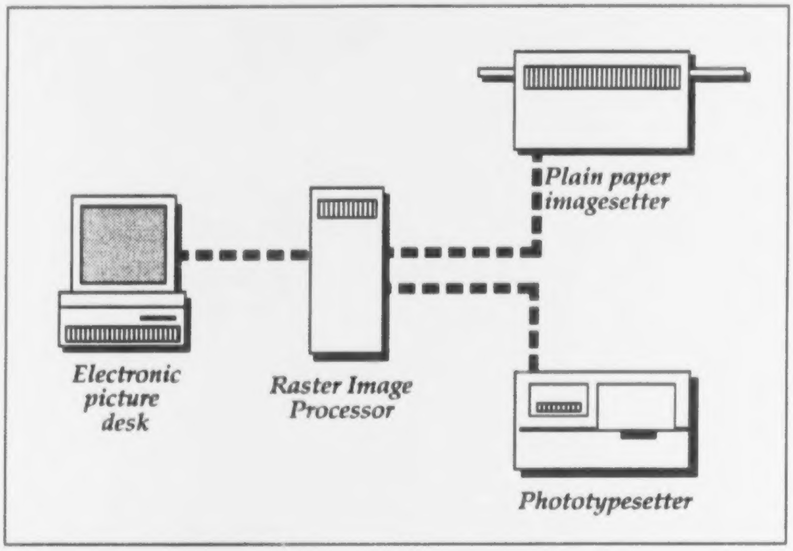
For some newspapers this new era will mean the purchase of a new imagesetter capable of handling the often complex files needed in picture production. For others, adapting to the new technology will mean simply retooling equipment already in place within the production department. Either way, extensive study is needed before purchasing a system.

Approach the purchase of an imagesetter with a great deal of care and consideration. This single piece of equipment could make or break an electronics system. An imagesetter incapable of doing the work will prove frustrating, time consuming and, most importantly, expensive. What newspapers don't pay in the initial investment could come back to haunt them at production time.

Although some newspapers are already equipped to take electronic picture files and turn them into either film or photographic paper halftones, the vast majority are not. Laserwriters, particularly the standard 300 dots per inch models, simply are not equipped to print acceptable halftone photographs. Most newspapers have two options when seeking a solution to the imagesetting dilemma, either an imagesetter or a high-quality plain-paper laserwriter.

Another consideration for many newspapers is pagination. Before investing thousands of dollars in an imagesetter, it is worth considering what the newspaper is going to do concerning either partial or total pagination in the next few years. Some, but not all, imagesetters are capable of accepting full-page layout programs. Each model has its own unique characteristics when it comes to speed and accuracy of output.

Newspapers might also want to consider that the imagesetter can be used by both the art and advertising departments to output illustrations and photographs. This can help legitimize the purchase cost to many bosses and spread the price tag over several departments. This chapter will look at the output and archival options available today.


Plain paper imagesetter
Electronic picture desk
Raster Image Processor
Phototypesetter

• Rasterization

One of the key components to any system is the machine that translates computer information from the central processing unit into data the imagesetter can understand and print. The device is known as a Raster Image Processor or, more commonly, a RIP.

The RIP translates the PostScript instructions into a bitmapped image at the resolution of the selected output machine (See appendix for RIPs and output devices). Some RIPs are faster and/or more efficient than others so care must be taken when purchasing this device.

Most errors in output occur at this point, and the RIP will try to compensate for them th its internal programming before passing the file to the imagesetter.

• Plain-paper Imagesetters

One of the simplest methods of outputting halftones is to use an imagesetter or laserwriter that prints on conventional paper as opposed to photosensitive paper. Currently plain-paper imagesetters are being experimented with as a cost-saving alternative to phototypesetters or imagesetters (See appendix).

One of the main drawbacks when using a laserwriter is image quality. Laserwriters are improving and may prove to be a viable alternative to the higher-priced phototypesetters. Newspapers that choose this option will need a system able to produce at least 1,000 dots per inch or more in order to achieve a quality halftone. Plain paper cannot match the quality of a silver-based phototypesetter.

• Photo Imagesetters

The photographic typesetter, or imagesetter, is the device most newspaper people are familiar with when it comes to outputting text. The high-end versions of these machines are still the most effective devices available for image processing. Imagesetters provide a continuous tone quality still not available in the plain-paper market.

The imagesetter uses laser technology to record the halftone or four-color separation onto film or photographic paper. Operators should pay constant attention to calibration and maintenance to guarantee predictable output. A variety of models are on the market that differ in speed, precision and resolution.

Exposed film or paper is sent to a processor. Temperature, speed, care and maintenance all play a role in the quality that can be obtained from the film processor.

• Archiving Images

Another key concern is archiving images. Newspapers that no longer make conventional prints must find a way to store photographs that do not exist in either negative or positive form. This is especially true with wire photographs where an electronic file exists, but no negative exists to put on file.

Electronic picture archiving is one of the most rapidly changing aspects of the digital photography world. Under ideal conditions editors would be able to call up file photographs with the touch of a button. In fact, entire folders on a particular individual could be called up and a decision can be made from an entire database of photographs of the subject. Operators will be able to cross search by name, date or other information.

One problem with archiving is storage space. Computerized picture files are extremely large. The current best option seems to be compressing the files with a standard compression program, and then putting them into storage. Compression can be done using either software or hardware (compression boards). Compression boards offer speed and convenience not available with compression software. Current systems for storage include multiple hard drives linked to the computer, optical disk or worm drives, or placing the files on compact disks.

Each of these options involves the purchase of peripheral devices that will drive up the cost of an electronic-imaging system. Using compact disks might require a newspaper to take the picture files in disk form to an outside company in order to press the information onto the CDs.

With an optical disk drive a newspaper may want to purchase a juke box-like device that rotates the desired disk into the drive for picture selection. These are extremely expensive in relation to the other items needed for a electronics system.

Notes

CHAPTER SIX

LAW

It is important to remember the law varies by jurisdiction. Usually by maintaining the same legal and ethical standards that kept a newspaper out of trouble in the past with conventional film photography it should be adequate when dealing with electronic imaging. But if any questions arise about what is legal in a specific city or state, be sure to contact a legal counsel specializing in communications law.

Much of what is done to a photograph is beyond the photographer's control. The addition or deletion of material electronically can pose serious problems for both the photographer and the publication. Ownership of images, especially those produced by free-lancers, is another potential problem area. This chapter will ouline the legal issues associated with electronics.

- **False light**
- **Libel**
- **Emotional Distress**
- **Copyright**

• False Light

Perhaps the greatest area of concern should be in dealing with false light invasion of privacy. False light is so close to libel that many jurisdictions fail to distinguish between the two. Each jurisdiction handles libel and false light matters according to its own rules.

False light involves the portraying of someone in a situation other than what has actually taken place. This portrayal can be either better or worse than what actually transpired. The new electronic technology makes it extremely easy for items and people to be removed from a picture or for two pictures to be merged. The merging of images has become extremely popular in magazine illustrations.

• Libel

As noted, libel is similar in many ways to false light invasion of privacy. In any photographic libel case four criteria must be met:

- **Image was defamatory.**
- **Person in image was identified or identifiable.**
- **Communication to a third party.**
- **Defamatory image was published due to negligence or willful disregard of the truth.**

The courts have said that any question of photographic libel must be judged in the context of the accompanying story. If the picture and story work together to portray the person falsely, then grounds may be present for libel litigation. And if it can be determined that a person would connect the individuals in a photograph with potentially defamatory accounts in the accompanying text, then the case may go before a jury for determination.

One of the key elements in proving libel is identification. By using electronic alteration, the identity of a person could be obscured. But then the question is under what circumstances should this be done? What reason is there for a newspaper to intentionally obscure a person's identity? Wouldn't it simply be easier not to run the photograph in question? These are questions that should be asked.

• Emotional Distress

Emotional distress is the power of words or pictures to cause psychological rather than physical harm to an individual. This tort exists separately from defamation (libel) in some states and is a part of the law in others. Often, a plaintiff seeking emotional distress damages must still meet the legal grounds set forth for cases involving libel or invasion of privacy.

One of the primary elements in an *intentional* infliction of emotional distress suit is the determination that the offending party showed extremely outrageous conduct that was either intentional or reckless. The courts have paid particular attention to the conduct of those who gathered and published the information, looking for behavior that would constitute an extreme departure from the ordinary. Electronic photographic alteration may easily be construed as an "extreme departure" from standard photographic reportage.

Under *negligent* infliction of emotional distress, the plaintiff has to prove only that the publication of the offending image resulted in illness or other bodily harm. Negligence may be far easier to prove in court than extremely outrageous behavior.

• Copyright

Some of the most interesting litigation concerning electronic imaging in the next few years may come from the area of copyright. Because images stored in digital form are so easily altered and transmitted, the potential for copyright violations is tremendous.

The right to copyright a photograph becomes the property of the creator as soon as the shutter is released. Newspaper staff photographers generally have little to do with copyright laws. Because they are under contractual agreement with the newspaper, their pictures fall under the "work for hire" provision of the copyright law. This gives ownership to the person who hired the photographer. The law holds true unless the photographer and newspaper have a written agreement that states otherwise.

The issue becomes even more interesting with free-lance photography. Magazines and advertising agencies buy images from stock agencies and free-lance photographers all the time. Pictures are already available in digital form on compact disks. They can also be sent electronically over telephone lines. With photographs becoming increasingly accessible worldwide, it will be difficult for photographers to keep track of how and where their images are used.

CHAPTER SEVEN

"People want the truth, deserve the truth. Get it to them."

—Anonymous

Ethics

Alteration, manipulation, enhancement or clarification, whichever name you use, the result of conventional film meeting modern computer is still the same - some readers may well be suspicious. Photojournalism has built a reputation on the perception of integrity. Unfortunately the new technology has opened the door for abuses that have cast suspicion upon the photographic community. But don't blame the technology; it's only the means to an end. In the hands of responsible users, the new equipment can play a positive and vital role in photography.

The new technology offers journalists an opportunity to analyze the conventional ethics accepted within their individual newspaper cultures.

This chapter will outline some of the ethical considerations newspapers should discuss as they move into the electronic photojournalism era. Here are two mission statements provided by organizations with an active involvement in photojournalism.

ASSOCIATED PRESS

Simply put, The Associated Press does not alter photographs. Our pictures must always tell the truth.

The electronic darkroom is a highly sophisticated photo editing tool. It takes us out of the chemical darkroom where subtle printing techniques, such as burning and dodging, have long been accepted as journalistically sound. Today these terms are replaced by "image manipulation" and "enhancement". In a time when such broad terms could be misconstrued we need to set limits and restate some basic tenets.

The content of a photograph will NEVER be changed or manipulated in any way.

Only the established norms or standard photo printing methods such as burning, dodging, black-and-white toning and cropping are acceptable. Retouching is limited to removal of normal scratches and dust spots.

Serious consideration must always be given in correcting color to ensure honest reproduction of the original. Cases of abnormal color or tonality will be clearly stated in the caption. Color adjustment should always be minimal.

In any instance where a question arises about such issues, consult a senior editor immediately.

The integrity of the AP's photo report is our highest priority. Nothing takes precedence over credibility.

Vincent Alabiso, Executive Photo Editor

NATIONAL PRESS PHOTOGRAPHERS

As journalists we believe the guiding principle of our profession is accuracy, therefore, we believe it is wrong to alter the content of a photograph in any way that deceives the public.

As photojournalists we have the responsibility to document society and to preserve its images as a matter of historical record. It is clear that the emerging electronic technologies provide new challenges to the integrity of photographic images. This technology enables the manipulation of the content of an image in such a way that the change is virtually undetectable. In light of this, we, the National Press Photographers Association, reaffirm the basis of our ethics: accurate representation is the benchmark or our profession.

We believe photojournalistic guidelines for accuracy currently in use should be the criteria for judging what may be done electronically to a photograph. Altering the editorial content of a photograph, in any degree, is a breach of the ethical standards recognized by the NPPA.

For years newspapers have permitted a variety of heavy-handed burning and dodging techniques without much discussion. For a long time pictures went to the airbrush artist so they could be "cleaned up" for publication.

One of the best things a newspaper can do is to establish what is acceptable practice with conventional photography before embarking on electronic imaging. This will give the newspaper a solid foundation from which to build its guidelines for ethical photographic practices.

Each newspaper should develop ethics tied to the community in which it operates. This could also be an opportunity to educate the public about what the newspaper considers good and bad uses of the technology.

Operators of the new technology need to know the "red light" and "green light" situations under which they operate. Some of the newspapers already on line with electronic imaging suggest establishing a set of guidelines (written if possible) for their use rather than formal rules. This provides latitude for the operators as they approach the gray areas of ethical photojournalism that will inevitably arise.

Operational guidelines and protocols are two documents that work together to help newspapers solve dilemmas. These statements should be drafted by representatives of the entire staff so that when journalists face ethical decisions on deadline, they can solve the problems quickly and logically. This makes the decision less of a "gut reaction" and more of a rational conclusion. The simpler the guidelines and protocols are, the easier they will be to implement.

The following are guidelines established by two newspapers already involved in electronic imaging, and a sample protocol devised by participants in a seminar at the Poynter Institute for Media Studies in January 1991.

ST. LOUIS POST-DISPATCH

•Guidelines for Scitex Use

One of the functions of the Scitex system is to enhance the technical quality of photographs to be published in the Post-Dispatch. To assure the integrity of our visual reportage, the system may not be used to distort or change the image in a way that misleads the reader, be it for news or feature display.

Technical corrections to the image may be made. These include gray-balance correction, lightening or darkening an image to improve legibility, removal of flaws such as dust and scratches and removal of glare if it is not part of the content. Glare should not be removed if doing so requires reconstruction of the content. Colors may not be changed in a way to distort the actual photograph or outside the limits of technical correction, as stated above.

Cropping is permissible to enhance the quality and effectiveness of a photograph.

Under most circumstances, moving, eliminating or adding elements in a photograph are prohibited. Exceptions may be made for work that is purely illustrative or that is intended to convey a symbolic or mood image or other special effect. For example, part or all of a background may be removed to enhance the structural effect of a particular display. Screening techniques (dot structure) are permissible to convey a mood effect.

Any change to a photograph that alters the content must be approved by the managing editor, or his surrogate. In the rare instance when altered photographs are published, the reader must be informed of the alteration.

Deliberate violations of this policy may result in disciplinary action.

The members of the Scitex committee were Jim Millstone, chairman; Amour Krupnik; Bill Kesler; Bob Holt III; Tony Lazorko and Laszlo Domjan.

COLUMBIA MISSOURIAN

•Electronic Image Enhancement Policy

One of the functions of the electronic picture systems is to enhance the technical quality of photographs to be published. To assure the integrity of our visual reportage, the software will not be used to distort or change the image in a way that misleads the reader, be it for news or feature display.

Technical corrections to the image may be made. These include gray-balance correction, lightening or darkening an image to improve legibility, removal of flaws such as dust and scratches and removal or glare if it is not part of the content. Colors may not be changed in a way to distort the actual photograph or be done outside the limits of technical correction, as state above. Cropping is encouraged to enhance the quality and effectiveness of a photograph.

Under most circumstances, moving, eliminating, or combining or adding elements in a photograph are prohibited. Exceptions may be made for work that is purely illustrative or that is intended to convey a symbolic or mood image or other special effect. For example, part or all of a background may be removed to enhance the structural effect of a particular display.

Any change to a photograph that alters the content must be discussed prior to execution and approved by the Director of Photography or the Director of the photojournalism sequence. Screening techniques (different dot shape) are permissible to convey a mood or effect, if approved. New images that are created electronically from existing images must also be approved by the managers mentioned above prior to execution. In the rare instances when altered photographs are published, the reader must be informed of the alteration in either the credit line or the caption, whichever is appropriate.

POYNTER PROTOCOL

Abuse of the technological changes by members of the publishing community have negatively affected the public's perceptions of photojournalism's credibility. In an effort to address the impact of this situation in our publishing culture, we would like to establish the following protocol.

It is our policy that content alterations of documentary photographs is unacceptable using past or present techniques or technology. This does not include illustration photography. If significant reason exists to challenge this policy it will be addressed in the following manner:

No discussion needed

- Dodging/burning areas that do not change content
  - 1) lightening football players faces in contrasty photos
  - 2) toning down a hotspot from strobe
- Correction of technical defects in a photo
  - 1) dust spots
  - 2) line hits in a wire transmission
  - 3) color shifts

Discussion required

- Photos with potential breach of community standards
  - 1) accidental inclusion of genitals
  - 2) obscene gestures or language
  - 3) offensive cultural elements

Discussion needed

- Photos that may offend community standards
  - 1) gruesome photos
  - 2) overwhelming grief and/or distress

Discussion group

- Photographer
- Top newsroom executive
- Picture desk representative
- Section editor where the picture will appear
- Ombudsman
- Expand the group to represent racial and gender diversity if it does not exist

Points to discuss

- Have you seen the picture and story?
- Is the photo misleading?
- News value
- Motivation for publishing
- Ethical/legal concerns
- Who will be offended?
- Consequences of publishing?
- What would you do if you were in the photo?
- Alternatives
- Justifications

Photo credits/labeling

All photo illustrations should be labeled as such. Whenever possible the cutline should contain an explanation of any special effect used in the creation of an illustration when the technique may cloud the reader's understanding of the photo. The underlying purpose of this explanation would be to eliminate the reader's perception of an intent to deceive.

GLOSSARY

A

ACCESS CODE: A group of characters or numbers that identify a user to the computer system. See Password or PIN.

ACOUSTIC COUPLER: A set of rubber cups used to connect a modem (MODulator/ DEModulator) to a telephone headset.

ADDITIVE COLORS OR PRIMARIES: Red, green and blue are the three colors used to create all colors used on a computer monitor. When you add all three, you get white. We cannot use additive colors in the printing world.

ALPHA CHANNEL: An eight-bit channel reserved by some image-processing applications for masking or additional color information.

ALPHANUMERIC: General term for alphabetic letters, numerical digits, and special characters that are on the keyboard.

ANALOG DATA: Information that covers a range of values with no increments from one value to the next. A wave of water is in analog form.

ANTI-ALIASING: The rendering or hard-edged objects so they blend smoothly into the background. A technique for merging object-oriented art into bitmaps.

APPLE: Cupertino, Calif., company that makes Macintosh and Apple computers.

APPLETALK: See LocalTalk.

APPLICATION: Task to be performed by a computer program or system.

APPLICATION PROGRAMS: The programs supplied by computer manufacturers and software vendors that make the computer perform useful functions, such as word processing, database management, picture enhancement and spreadsheet analysis.

ARCHIVE: To copy programs and data on to an auxiliary storage medium such as removable disks or magnetic tape for long-term retention.

ARTIFACT: A visible indication (defect) in an image, caused by limitations in the reproduction process (hardware or software).

ASCII: Acronym for American Standard Code for Information Interchange. Used to code data for transmission between computers or from the computer to devices such as a printer. A standard format for representing digital information in eight-bit chunks.

AUTO-ANSWER: A modem that can automatically answer incoming telephone calls from computers and send data into another computer.

AUTO-DIALING MODEM: A modem that can automatically redial a busy phone number until a connection is made.

B

BACKUP: To make a copy of a program or data in case the original is lost, damaged or destroyed.

BANDING: A visible stair-stepping of shades in a gradient.
BATCH PROCESSING: Technique in which a single program processes many individual, often unrelated functions, at the same time.
BAUD: Unit used to measure the bytes per second in which a data is transmitted.
BELL 212A: Common format for transmitting data via telephone lines.
BERNOULLI BOX: A removable hard disk system manufactured by iomega Corporation. Combines the speed of a hard drive with the portability of a floppy disk.
BEZIER CURVES: In object-oriented programs, a curve whose shape is defined by anchor points set along its arc.
BI-DIRECTIONAL PRINTER: Printer that prints from left to right and then right to left.
BIG BLUE: IBM alias.
BINARY CODE: A coding system in which all data is represented by a series of ones or zeroes (1 or 0). For example, the capital A is coded as 01000001.
BIOS: Acronym for Basic Input/Output System. Software routine usually built into the computer's ROM (permanent memory) that allows the central processing unit to communicate with the monitor, disk drives, keyboard and printer.
BIT: An acronym for BInary Digit. The smallest unit of computer data.
BITMAPPED: An image formed by a rectangular grid of pixels. The computer assigns a value to each pixel, from one bit of information (black or white), to as much as 24 bits per pixel for full color images.
BOARD: Short for printed circuit board.
BOMB: Failure in a computer system that completely disrupts the operation of the computer.
BOOT: To turn a computer on. To begin the process that makes a computer reader for the user.
BUBBLE MEMORY: Data storage using magnetized dots. Offers high capacity but is very expensive.
BUFFER: Temporary storage area in RAM where data is placed when it is being moved from one device to another, such as from the computer to the printer. See Queue.
BUG: A programming error that can cause unexpected results.
BULLETIN BOARD: Computer that is used by users to post messages, programs or data for other users.
BUNDLED: Selling a group of computer items as a single unit. Often software is bundled with hardware.
BUS: Path for transferring data. Expressed as an x-bit bus, for example 16-bit bus. The larger the bus, the faster data is transferred. AT class machines have a 16-bit bus, and 386 class machines have a 32-bit bus.
BYTE: A group of eight bits.

C

CALIBRATION: Setting equipment to standard measure to produce reliable results.
CALIBRATION BARS: On a

negative, proof or printed piece, a strip of tones used to check printing quality.

CARD: Another term for printing circuit board. Also name of data storage medium (see board).

CCD: Acronym for Charged Coupled Device. Key element in most still video cameras.

CIE: Acronym for Commission Internationale de l'Eclairage. International group that has developed a set of color definition standards endorsed by Adobe for PostScript Level 2.

CMYK: Acronym for Cyan, Magenta, Yellow and Black. The subtractive primaries or process colors used in color printing. Black is usually added to enhance color and to print a true black.

COLOR CORRECTION: The process of adjusting an image to compensate for scanner deficiencies or for the characteristics of the output device.

COLOR PICKER: Utility for specifying colors on the monitor.

COLOR PROOF: Representation of what the final printed composition will look like. The resolution and quality of different types of color proofs can vary greatly.

COLOR SEPARATION: The division of an image into component colors for printing. Each color separation is a piece of negative or positive film.

COMPRESSION: Process of changing a computer file into a form of digital shorthand to aid in transmission or storage.

CPU: Central Processing Unit. The chip that controls the interpretation and execution of all commands to and from the computer. Intel and Motorola make the microprocessors used in almost all PCs available today.

CENTRONICS INTERFACE: Common parallel interface that connects the printer to computer.

CHAIN: A set of operations performed sequentially.

CHARACTER: Any symbol, letter, punctuation mark or digit stored or processed by a computer.

CHIP: Jargon for integrated circuit chip (ICC).

CIRCUIT BOARD: Printed circuit board which components are mounted on.

CLICK: To push the button on a computer mouse.

CLIPBOARD: Computer memory used to store data being transferred from one file or program to another. Unlike the buffer, whether data is stored is operator dependent.

CLONE: Generally refers to a computer made to perform identically to an IBM computer or other name brand.

CLUSTER: One or more consecutive sectors of disk storage. DOS stores program or file data in sectors.

CMY: Cyan, magenta, yellow.

COLD BOOT: When the computer is first turned on.

COLOR CORRECTION: Process of changing the color of the pixels that make up a color image. Adjustments include brightness, contrast, midtones, shadows, highlights, hues and saturation of colors.

COMPANDER: Compression/Expansion device. Word coined by Leaf Inc. for its compression device.

COMPATIBILITY: How much one computer or program is like another computer or program.

COM PORT: Used for serial, one bit at a time, transmission of data. Usually there is at least one COM port in a computer. See Serial Port.

COMPUTER: An electronic device which, by means of stored instructions or information, performs rapid, often complex calculations or compiles, correlates and selects data.

CONFIGURATION: The process of adapting hardware and software to your system.

CONNECT TIME: The time from sign on to sign off when associated with on-line data bases.

CONTROL BREAK: Special processing that takes place during a break in normal program operation.

CONTROL CHARACTER: A character whose purpose is to initiate, modify or stop control of a program.

CONTROL KEY: A function key that allows special operations to occur. Abbreviated as CTRL in many software and hardware manuals.

CONVERSION: Changing data from one form to another.

CPI: Acronym for characters per inch.

CRASH: Sometimes referred to as a glitch, this is what happens when the computer loses electrical power, or there is a failure in the program.

CROMALIN: A color proofing system using powdered pigments instead of ink.

CT: Acronym for Continuous Tone. File format used for exchanging high-level scan information.

CTRL: Acronym for Control.

CURSOR: Block on screen that indicates where the next character will appear.

CUT AND PASTE: Similar to block move. A block of text or art is defined and then removed (cut) from one location and placed in another (paste).

D

DCS: Acronym for Desktop Color Separation. Format which creates five PostScript files for each color image.

DEBUG: To correct errors in a program. See Bug.

DECOMPRESSION: Process used to changed compressed files back into their original form.

DEDICATED COMPUTER: A computer that is used for only specific tasks.

DEDICATED PHONE LINES: Telephone lines intended only for specific uses. Generally data communication.

DEFAULT: Condition that will apply in software unless it is changed by the user.

DENSITY: The number of characters that can be stored in a given physical area. As density increases, data storage increases.

DENSITOMETER: Device sensitive to the density of light transmitted or reflected by paper or film. Used to check the accuracy, quality and consistency of output.

DESKTOP COMPUTER: Computer small enough to fit on a desk.

DESKTOP PUBLISHING PROGRAM: Software used to produce near-typeset quality documents.

DEVICE: Computer peripheral

or any piece of hardware not hardwired to the computer's main or motherboard.

DIGITAL IMAGE: An array of pixels in which each has its own color. When viewed on a monitor or paper the digital image appears like a photograph.

DIGITIZE: To produce a data representation of a picture or illustration for graphic use.

DIP SWITCHES: Dual In-line Package switches. Switches on a piece of hardware, such as a modem or printer, which when set correctly configure the device for optimum performance within the system.

DIRECTORY: Computer's filing system.

DISKETTE: A portable storage medium. Popular formats are 5.25-inch and 3.5 inch. See also Floppy Disk and Floppy Disk Drive.

DISK OPERATING SYSTEM: (DOS) A program that tells the computers how to store and organize files on a floppy or hard disk drive. MS-DOS runs on IBMs and clones. The Macintosh disk operating system is called the Finder.

DISPLAY: Computer monitor.

DITHERING: Process of specifying color to adjacent pixels in order to simulate a third color in a bitmapped image. This technique is used when a full range of colors is not available.

DMAX: Highest level of density on a film negative.

DOCUMENTATION: The manuals used to describe hardware, software or systems.

DOT GAIN: Effect in the printing process which causes dots making up a photo to print larger than they were intended and therefore darker.

Dot gains of 30 percent are common in the mid-tones of an image and lesser amounts in the highlights and shadows.

Dots are measured with a densitometer as part of the calibration process.

DOT MATRIX PRINTER: Printer that produces characters represented as a pattern of dots.

DOUBLE-SIDED DISK: A floppy diskette capable of storing data on both sides. Nearly always the case in today's computers. The disk drive must be capable of writing and reading on both sides.

DOWNLOAD: Transferring data from a remote computer to a user's computer.

DPI: Acronym for Dots Per Inch.

DRAG: Moving a graphic image or icon from one location to another.

DRIVER: Software the computer uses to make another device perform a prescribed function.

DUMB TERMINAL: Keyboard or monitor unit linked to a distant computer, but capable only of imputing commands and requests.

DUMP: Process of storing data by "dumping" it to a storage location. In many cases, the dump is used to back up data for storage in a safe, alternate location such as a floppy diskette.

DUPLEX: When data is sent and received at the same time.

E

ELECTRONIC CAMERA: Captures photographs on magnetic media (usually computer diskette) rather than film. See Still Video.

ELECTRONIC PICTURE DESK: Computer-based wirephoto picture receiving, manipulation and output device capable of interfacing to pre-press systems.

ELLIPTICAL DOT: Type of halftone screen dot with an elliptical rather than circular shape, which sometimes produces better tonal gradations.

EPS: Acronym for Encapsulated PostScript File. File format used to transfer PostScript image information from one program to another.

ETHERNET: Network system which allows six megabytes of information per minute to be communicated between computers and/or peripherals.

EXECUTE: To run a program.

EXIT: Program command used to leave a program.

EXPANSION SLOTS: Spaces used to connect printed circuit boards to the computer's circuitry. Where input/output boards, internal modems are placed.

F

FAST COMPRESSION: Compression program built into a board within a computer.

FILE: Anything that is stored. Programs and data are all files.

FILE NAME: A one- to eight-character name used by DOS to identify a file.

FILE SERVER: Computer attached to the network that sends messages or files from one network user to another, stores a backup copy of software programs, stories or art files and can send files to different printers on the network.

FILE SIZE: The amount of data in a file. Usually shown in kilobytes.

FIRMWARE: Programming that is part of a computer chip and not lost when power is turned off

FLOPPY DISK: Come in two basic sizes, 3.5 and 5.25 inches. Present upper limits of storage space are 1.4 megabytes on 3.5-inch disks and 1.2 mb on 5.25-inch disks.

FLOPPY DISK DRIVE: Device that reads data from a floppy disk and writes (copies) data to a floppy disk.

FOOTPRINT: Amount of area, such as desk space, required for a piece of hardware.

FORMAT: A DOS command that makes new diskettes ready for use. Also, the manner in which data is arranged or stored in a database.

FRIENDLINESS: A measure of how easy or forgiving hardware or software is.

FUNCTION KEY: Special key that can perform specific function or series of functions assigned by the user.

G

GAMMA: Relationship of midtones within an image.

GAMMA CORRECTION: Compressing or expanding the ranges of dark or light shades in an image.

GARBAGE: Bad or incorrectly entered data or worthless output resulting from an incorrect programming step.

GATEWAY: A connection, either computer or peripheral, that exists between two different data networks.

GCR: Acronym for Gray Component Replacement. A technique for reducing the amount of cyan, magenta and yellow in an area and replacing them with an appropriate level of black.

GIGABYTE: One million bytes.

GIGO: Acronym for Garbage In, Garbage Out. Refers to concept that if bad data is entered, the result is bad output.

GLITCH: Technical computer term used to express an unexpected problem.

GLOBAL: Program function that allows all occurrences of a specific bit of data in a file or database to be changed in one process.

GPIB BOARD: Acronym for General Purpose Interface Board. Board that fits inside a PC or other computer and accepts a digital signal. These are typically used to interface a stand-alone scanner or electronic darkroom to a PC or Mac.

GRADATION: Smooth transition between black and white, one color and another, or color and the lack of it.

GRAPHICAL USER INTERFACE: Software that allows the user to give the computer instructions by selecting graphic symbols called icons. Almost all programs for Macintosh use a graphical user interface. MS-DOS-based shells, such as Microsoft Windows and Digital Research GEM, offer similar features on IBMs and clones.

GRAY COMPONENT REPLACEMENT: (GCP) Complete removal of cyan, magenta and yellow inks and replacement with black ink.

GRAY-SCALE IMAGE: Image whose pixels can have up to 256 levels of gray. Each pixel has eight bits of color information. Since each dot making up a pixel can be adjusted by the eight bits of information, this works out to a math formula of two to the power of eight or 256.

H

HANDSHAKING: Communications protocol in which the receiving computer sends periodic acknowledgments that it is receiving the data to the transmitting computer.

HARD DISK DRIVE: Storage device that is not removable. The amount of data a hard disk drive can store varies but is commonly more than 32 mb; the equivalent of between 30 and 60 floppies.

HARDWARE: Generic term for the equipment that makes up a computer system excluding the programs.

HOME: Where the cursor usually starts on the screen, generally the upper left corner.

HSI: Acronym for Hue, Saturation and Intensity.

HSV: Acronym for Hue, Saturation and Value.

I

IBM: International Business Machines Corp., a.k.a. Big Blue. New York-based computer giant.

IBM CLONE: Non-IBM computer designed to be compatible with MS-DOS.

ICON: On-screen graphic symbol that stands for some programming process.

IMAGESETTER: Device used to output a computer image or composition at high resolution onto photographic paper or film.

INK-JET PRINTER: Printer that prints with jets of ink such as the Hewlett-Packard Deskjet printer series.

INPUT: Moving data into the computers processors. Most commonly this is via the keyboard, although it applies equally to any peripheral device, such as a disk drive or scanner.

INPUT/OUTPUT DEVICE: Peripheral capable of moving data both to and from the computer such as a modem.

INSTALL: Process by which hardware or software is configured within a computer system. Many software packages contain a special sub-program that provide the user with step-by-step instructions for installing the program.

INTEGRATED SOFTWARE: Collection of programs with different functions that can exchange data.

INTERACTIVE: Programming that reacts immediately to the user's input, usually with the user having to press the Enter key.

INTERFACE: Device that makes the computer understandable to the operator. In hardware, the monitor serves as an interface. In software, operating systems serve as interfaces.

INTERNAL MODEM: Modem mounted on a printed circuit board that is placed in an expansion slot, as contrasted to an external modem.

J

JPEG: Acronym for Joint Photographic Experts Group. Group proposing a standard for file compression.

K

K: Notation for black when dealing with color images.

KEY OR KEYBOARDING: Process of entering data via the keyboard.

KEYBOARD: Input device used to manually enter data.

KILOBYTE: 1024 bytes. Abbreviated as Kb or kb, generally used to indicate either how much RAM a computer has or how much data can be stored on either a floppy disk or hard drive.

L

LAN: Acronym for Local Area Network. Hardware and software used to connect a number of computers in a small specific area together.

LANGUAGE: Words and

symbols used to write a computer program. Computer languages are usually either high-level or low-level.

LASER PRINTER: Printer that uses a process much like photocopying to place text or graphics on paper. Laser printers have a dot resolution of at least 300 dpi, while some offer 400 or 600 dpi. Laser printing is totally electronic.

LEAF ELECTRONIC DIGITAL DARKROOM: Computer system vended by the Associated Press that electronically receives wirephotos.

LOAD: To read data into a computer. Also, to put a floppy diskette into a disk drive.

LOCAL TALK: Formerly called AppleTalk. Wiring network used to communicate between Apple computers. Moves information at about one megabyte per minute.

LOG OFF: To end a connection made with a remote computer.

LOG ON: To begin a connection with a remote computer.

LOSSLESS COMPRESSION: To compress a file without loss of information. Usually uses low compression ratios.

LOSSY COMPRESSION: Compression at a high ratio usually resulting in some loss of information.

LPI: Acronym for lines per inch. Measure of the frequency of halftone screen.

LPT: A parallel input/output path. Usually there is at least one, designated as LPT1, which is what your printed will be hooked up to.

LUT: Acronym for Look Up Table. Table of colors a computer can display at a given time. Tables used to approximate desired color from those available to the computer.

M

MACHINE LANGUAGE: A cryptic language used by serious computer programmers because of its speed.

MACINTOSH: A series of computers made by Apple Computer. McIntoshes are characterized by how easy they are to use.

MACRO: Programming language statement that results in series of operations being carried out.

MAGNETIC DISK: See floppy diskette.

MAGNETIC TAPE: A plastic tape with a coating of metallic oxides that can store data. Generally a reel is about 2,400 feet long.

MAGNETIC TAPE DENSITY: The number of characters that can be recorded on one inch of tape. Common densities are 1,600 and 6,250 bits per inch (bpi).

MAGNETIC TAPE DRIVE: Hardware that mechanically moves the tape across a read/write head.

MAGNETO OPTICAL DRIVE: Hard disk storage device that uses a laser to store and read data on a magnetically sensitive disk. The disk is removable in a cartridge case.

MAINFRAME: The largest, fastest and most expensive of computers.

MAIN MEMORY: Memory located in the central processing unit, usually the fastest temporary storage area. Also called RAM.

MASK: Inactive area or a

bitmapped image which will not respond to changes.

MB: Abbreviation for megabyte.

MEGABYTE: One million bytes of information.

MEMORY: Generic term that applies to the computers ability to store, manipulate and display data.

MENU: A list of options presented on the screen by the program.

MENU-DRIVEN SOFTWARE: Programming in which the user specifies items from successive menus that appear on the screen.

MERGE: To combine two or more groups of data into one larger, arranged set of data.

MICROCHIP: A silicon chip with electronic components and circuits etched into its surface.

MICROCOMPUTER: Technically correct term for personal computer.

MICROPROCESSOR: Integrated circuit chips, such as the Intel 8088, 80286 and 80386 that perform a combination of basic arithmetic logic and control functions when processing.

MINICOMPUTER: A computer, more powerful than a microcomputer but less powerful than a mainframe.

MODEM: An acronym for MOdulator/DEModulator. Device that converts the digital signal into a tone-wave form for long distance transmissions. The binary zero would be converted into a different frequency tone than the binary one.

MODULE: A distinct portion of either a program, or more usually, a piece of hardware such as a printed circuit board.

MOIRE: Undesirable artifact produced in printing when halftone screen patterns become visible. Often caused by misaligned screens.

MONITOR: A video display.

MONITOR CALIBRATION: Process of correcting the color rendition of the monitor to match the printed output.

MONOCHROME MONITOR: A monitor which displays characters in a single color on a contrasting background.

MOUSE: Device used to move the cursor or a pointer around the screen. Buttons on the mouse execute program functions when they are clicked.

MULTITASKING: The ability of a computer to perform two or more tasks at one time.

N

NANOSECOND: One-billionth of a second.

NETWORK: Number of computers or computer terminals connected together.

NODE: A terminal or station, that along with others, is connected to one common computer or is part of a computer network.

O

OCR: Acronym for Optical Character Recognition or Optical Character Reader. Device capable of reading typed characters off a printed page into the computer.

OFFLINE: Devices not being controlled by the computer.

OFFLINE STORAGE: Storing

data on a removable diskette, such as a 5-1/4 floppy, or Bemoulli removable hard disk.

ONLINE: Devices being controlled by the computer.

OPEN: Command common to many programs that is used to read a data file into the program for the user.

OPTICAL DISK: Storage medium that uses a LPT. Uses a laser to burn a pattern of holes into a film on a disk surface. In terms of data stored per area, optical disks can store hundreds of times the amount of data that can be stored on floppies. One optical disk can hold as much as one billion bytes of data.

OUTPUT: Data sent from the computer to a peripheral device such as a monitor or printer.

OUTPUT DEVICE: Hardware designed to accept data from the computer, such as a modem, monitor or printer.

P

PAGINATION: Electronic manipulation of text and graphics so that an entire page is printed at one time.

PALETTE: The available colors or shades of gray in a computer graphics system.

PARALLEL PORT: Where a printer can be connected. Technically, this is an input/output device that sends an entire byte at a time for transmission to an external device.

PARK: Positioning the hard-drive heads in a spot where no data is stored.

PASSWORD: Code word used to allow the user access to the computer.

PERIPHERAL EQUIPMENT: Any piece of hardware that is not part of the base computer equipment configuration, such as a printer or modem.

PERIPHERAL SLOTS: Technical term for expansion slots.

PERSONAL COMPUTER: (PC) A computer designed for individual use.

PERSONAL IDENTIFICATION NUMBER: (PIN) Security system similar to a password.

PHOTOSTREAM: Digital photo transmission system that is being established by the Associated Press.

PICT/PICT2: Common format for defining bitmapped or object-oriented images on the Macintosh. Pict 2 supports 24-bit color.

PIXEL: A single dot on the computer's screen. Smallest portion of a computer image.

PORT: The interface through which data is sent from or to a computer.

POSTSCRIPT: A page description language developed by Adobe Systems for use in laser printers. This language translates screen graphics into high-quality printed text and graphics.

POWER SURGE: Brief increase in current going to a circuit. Can result in circuit cards or components being burned out.

PPI: Acronym for Pixels Per Inch.

PROGRAM: Set of instructions that cause computers to do something.

PROMPT: Computers do nothing without being asked to, therefore, they ask by displaying a prompt.

PROTOCOL: Rules or conventions governing data transmission and telecommunications.

PUBLIC DOMAIN SOFTWARE: Programming that has been released for free use by the public. Not the same as shareware.

PULL-DOWN MENU: A menu that can be brought onto the screen at the user's discretion generally by moving the cursor to a list of menus at the top of the screen.

R

RAM: Acronym for Random Access Memory. Where data and program information is when the computer is operating. In terms of how much to have in a computer, 640 Kb of RAM is the least you will need for many programs. NOTE: When power to the computer is turned off any information in RAM is lost.

RASTERIZATION: Process of converting mathematical and digital information into a series of dots by an imagesetter for the production of negative or positive film.

READ: Process performed by the floppy disk drive or hard disk drive during which previously stored data or program information is put into the computer's RAM.

REBOOT: Restarting the computer. Erases RAM and goes through the same routines as when the computer is first turned on.

RECORDER: Back part of a laser typesetter where the paper or film is exposed by a laser beam to create an image.

RGB: Acronym for Red, Green and Blue. Additive primary colors.

RIP: Acronym for Raster Image Processor. Device found inside a laser printer or laser typesetter where electronic signals are controlled. The RIP is made up of software and hardware whose job it is to interpret the signal generated and sent by the computer and then form a pattern of dots so the printer's recorder unit can draw this on paper using a laser beam.

ROM: An acronym for Red Only Memory. Contains so-called non-volatile memory that is not lost when power is lost or the computer is turned off.

S

SAVE: Common command term used to write data to a storage device such as a floppy disk or hard disk drive.

SAVE AREA: Location in main memory that is used for the temporary storage of data.

SCANNER: Device that can recognize visual symbols and input them to the computer.

SCREEN DUMP: Process of copying the screen image to a printer or as a file to be stored on a diskette.

SCITEX: High-quality full-color system manufactured in Israel and sold in the United States by Scitex America Corp. in Bedford, Mass. Scitex can scan photographs, accept wire photos, accept computer files or still video images and enhance these with sophisticated color correction tools. These can then be output on film separations at up to a 175-line screen for very high quality work.

SCITEXING: Slang term for picture alteration.

SCROLLING: Screen process of moving text vertically up and down.

SCSI: (pronounced scuzzy) Acronym for Small Computer Systems Interface.

SERIAL PORT: An input/output port to which a modem, mouse and/or printer is usually connected. The primary difference between serial and parallel ports is the manner in which data is processed. The serial port processes data one bit at a time.

SHAREWARE: Software that can be examined, used and copied without cost, under the agreement that if the user finds the software useful, a fee will be paid.

SIGNING ON: Processing of establishing access to a bulletin board or on-line data base.

SMARTSCANNER: Scitex's color input scanner, the first step in using the system. A negative is scanned and broken down into pixels.

SOFTWARE: Computer programs or data which make hardware worth having.

STILL VIDEO: Television quality images containing no motion.

STILL VIDEO CAMERA: See Electronic Camera.

STILL VIDEO PLAYER: Allows you to view the images captured on an electronic camera.

STORAGE: A device or medium on which data is kept, such as floppy diskettes and hard drives.

STORAGE CAPACITY: The amount of data the medium can hold, usually expressed in either kilobytes or megabytes.

SUBTRACTIVE COLORS: Cyan, magenta, yellow and black are the colors we use in the printing process to produce all other colors. If you add 100 percent of all these colors you get black. This is ;the opposite of the computer monitor which adds the three colors to give you white. So we have to separate the image into CMY and K components, make a negative and plate for each color of ink to put on the printing press and reduce the amount of each color ink to print a color image.

SYSTEM: Grouping of hardware devices and equipment that comprises the computer and peripherals.

SYSTEM RESET: Technical name for reboot.

T

TAPE DRIVE: See Magnetic Tape Drive.

TARGA: (TGA) File format for exchanging 24-bit color files on PCs.

TERMINAL: A keyboard and screen connected to a remote computer.

TIFF OR TIF: Tagged Image File Format. File format for exchanging bitmapped images between applications.

TOKEN RING: IBM network used to communicate between computers and/or peripherals. Many typesetting and system devices in the newspaper industry are not Token Ring compatible.

TOGGLE: Any device that can have two stable states, such as a light switch which can be either on or off.

TRANSCEIVER: Device used for compression and decompression. Usually associated with Leaf Systems technology.
24-BIT COLOR: An image composed of three primary colors on a computer monitor (red, green and blue) with each color having eight bits of color information. Added together you have 24 bits of color information for each pixel. So, two to the power of 24 is 16.7 million color combinations that are possible for you to display on the computer monitor.

U

UCR: Acronym for Undercolor Removal. Technique for reducing the amount of magenta, yellow and cyan in neutral areas and replacing them with an appropriate amount of black.
UNDERCOLOR REMOVAL: In color correction work, this involves removing some cyan, magenta and yellow inks from the darkest but neutral part of an image and replace them with black ink. This saves money on expensive color inks when you have a large press run.
UPLOAD: To transfer data from the local computer to a remote computer.
UTILITY: Smaller programs that often serve a single, simple purpose which can be used to alter or manipulate a file or data.

V

VENDOR: Company that sells software, hardware or computer-related services.
VIDEO IMAGE CAPTURE BOARD: Frame digitizing board. Board inside a computer that accepts a still video signal and converts the signal into a digital image. These boards can capture images from television reports fed directly into the board from cable TV.

W

WRITE: Process of placing data on a floppy disk or hard drive.
WYSIWYG: Acronym for What You See Is What You Get. Usually associated with screen appearance to page output appearance calibration.

Special thanks to Sherry Ricchiardi, National Institute for Advanced Reporting, Agfa Corp., and the Dallas Morning News

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ARCHIVING

Alphatronix
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Research Triangle Park, NC
277u09-3687
919-544-0001

DataPak
Mass Microsystems
810 W. Maude Ave.
Sunnyvale, CA 94086
408-522-1200

Micro Dynamics LTD
8555 16th St., Suite 701
Silver Springs, MD 20910
301-589-6300

Micronet Technology Inc.
20 Mason
Irvine, CA 92718
714-837-6033

PhotoView
Tribune Publishing Co.
P.O. Box 957
Lewiston, ID 83501
800-745-9411

Sony
3 Paragon Drive
Mountvale, NJ 07645
201-930-4752

Victor Hasselblad
10 Madison Road
Fairfield, NJ 07006
201-227-7320

COLOR MONITORS

Apple/Macintosh
20525 Mariani Ave.
Cupertino, CA 95014
408-974-6495

IBM
44 South Broadway
White Plains, NY 10595
914-288-3214

RasterOps
1710 Fortune Drive.
San Jose, CA 95131
408-434-1010

Radius Inc.
5001 LBJ Freeway
Heritage Square Tower II
Seventh Floor
Dallas, TX 75244
214-387-5288

COLOR PRINTERS

AGFA/Compugraphic
200 Ballardvale St.
Wilmington, MA 01887
508-658-5600

Canon
One Canon Plaza
Lake Success, NY 11042-9979
800-892-0020

Eastman Kodak
Printer Products Division
343 State St.
Rochester, NY 14650
716-724-9629

Nikon
1300 Walt Whitman Road
Melville, NY 11747
516-547-4200

Sony
3 Paragon Drive
Mountvale, NJ 07645
201-930-6154

ELECTRONIC PICTURE DESKS

Agence France Presse
1612 K Street N.W., Suite 500
Washington, D.C. 20006
202-861-8535

Associated Press/Leaf
50 Rockefeller Plaza
New York, NY 10020
212-621-1909

Color Group Fotoflow
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Richmond, CA 94805
415-237-5577

Crosfield Canada
6500 Kestrel Road
Mississagua, ONT L5T1Z6
416-670-3933

Harris Controls and
Composition Division
P.O. Box 430
Melbourne, FL 32902
407-242-5608

National Digital Corp.
2783 B Hartland Road
Falls Church, VA 22043
703-573-5100

Nikon Inc.
1300 Walt Whitman Road
Melville, NY 11747-3064
516-547-4200

Reuters Information Services
1333 H Street NW
Washington, D.C. 20005
202-898-8413

Sinclair Communications
24 Commerce St.
Springfield, NJ 07081
201-376-1272

Tecnavia
Synaptic Electronic Publisher
800-833-5312

Total Image Corp.
NY Division
One Edgewater Plaza
Suite 202
Staten Island, NY 10305
718-720-9266

United Press International
427 Hill St.
San Francisco, CA 94114
415-550-7740

Victor Hasselblad Inc.
10 Madison Road
Fairfield, N.J. 07006
201-227-7320

IMAGE COMPRESSION

Radius
5001 LBJ Freeway
Heritage Square Tower II
Seventh Floor
Dallas, TX 75244
214-387-5288

Storm Technology
1101 San Antonio Road, #101
Mountain View, CA 94043
415-691-1111

Telphoto Communications
Inc.
11722 Sorrento Valley Road
Suite D
San Diego, CA 92121-1084
619-452-0903

IMAGING SOFTWARE

Adobe Inc.
1585 Charleston Rd.
P.O. Box 7900
Mountain View, CA 94039-
7900
800-344-8335 415-961-4400

Aldus Corp.
411 First Ave. South
Suite 200
Seattle, WA 98104
206-628-2313

Astral Development Corp.
Londonerry Square, Suite 112
Londonderry, N.H. 03053
603-432-6800

Letraset USA
Photone PrePress
508-655-7081
40 Eisenhower Drive
Paramus, N.J. 07653
800-343-8973

Photone International
123 N. Main St.
Sherborn, MA 01770
508-655-7081

Pre-Press Technologies
2441 Impala Drive
Carlsbad, CA 92008
619-931-2695

U-Lead Systems Inc.
680 Knox St.
Torrance, CA 90502
213-538-8911

APPENDIX I

OUTPUT DEVICES

AGFA/Compugraphic Division
200 Ballardvale St.
Wilmington, MA 01887
508-658-5600

Autologic
91050 Rancho Conejo Blvd.
Thousand Oaks, CA 91320
855-498-9611

Birmy Graphics Corp.
255 East Drive, Suite H
Melbourne, FL 32904
800-752-5306 407-768-6766

ECRM (Autokon)
534 Clark Road
Tewksbury, MA 01876
508-851-0207 800-537-ECRM

Linotronic Hell (Hyphen and Ultra)
425 Oser Ave.
Hauppauge, N.Y. 11788
800-633-1900

Printware Inc.
1385 Mendota Heights Road
St. Paul, MN 55120
800-456-1400 612-456-1482

PORTABLE TRANSMITTERS

Leaf Systems
P.O. Box 8240
1 Apple Hill
Natick, MA 01760
508-654-9715

T/One
75 Palmer,Suite 118
Quincy, MA 02169
617-471-9904

National Digital Corp.
2783 B Hartland Road
Falls Church, VA 22043
703-573-5100

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Nikon Electronic Imaging
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Garden City, NY 11530
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Fairfield, NJ 07006
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Wilmington, MA 01887
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Cupertino, CA 95014
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Array Technologies
7730 Pardee Lane
Oakland, CA 94621

Barneyscan Corp.
1125 Atlantic Ave.
Alameda, CA 94501
415-521-3388

Eastman Kodak
343 State St.
Rochester, NY 14650
716-724-7790

Hewlett-Packard
3000 Hanover St.
Palo Alto, CA 94304
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IBM
44 S. Broadway
White Plains, NY 10595
914-288-3214

Microtek Lab Inc.
680 Knox St.
Torrance, CA 90502
800-654-4160

Nikon Inc.
623 Stewart Ave.
Garden City, NY 11530
516-222-0200

Truvel

8943 Fulbright Ave.
Chatsworth, CA 91311
818-407-1031

VIDEO FRAME GRABBERS

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One Canon Plaza
Lake Success, NY 11042-9979
800-892-0020

Data Translation
100 Locke Dr.
Marlboro, MA 01752-1192
800-522-0265

IBM
44 South Broadway
White Plains, NY 10595
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810 W. Maude Ave
Sunnyvale, CA 94086

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5001 LBJ Freeway
Heritage Square Tower II,
Seventh Floor
Dallas, TX 75244
214-387-5298

Truevision
7351 Shadeland Station #100
Indianapolis, IN 46256
800-858-TRUE

STILL VIDEO

Eastman Kodak
343 State St.
Rochester, NY 14650
716-724-7790

Nikon Inc.
1300 Walt Whitman Road
Melville, NY 11747
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Sony
Sony Drive MD 2-S8
Park Ridge, NJ 07656
201-930-7796

APPENDIX II

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